TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1157.

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFFS IN ERROR,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER 10, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 11, 1887.

1 *Complaint.*

In the Superior Court of the State of California in and for the City and County of San Francisco.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

Comes now the plaintiff and complains of said defendant above named and for cause of action avers—

That the said defendant is and for more than a year last past has been a corporation organized and existing under the laws of said State of California, and during all that time has been and still is the owner of and operating a railroad in the counties of Alameda, Butte, Fresno, Merced, Nevada, Placer, Sacramento, San Joaquin, Santa Clara, Shaster, Sierra, Stanislaus, Sutter, Tehama, Tu-
2 lare, Yuba, and the city and county of San Francisco, in said State.

Plaintiff avers that on the 16th day of August, in the year eighteen hundred and eighty-four, the State board of equalization assessed the franchise, roadway, road-bed, rails, and rolling stock of the defendant at the sum of twenty-four million (24,000,000) dollars.

That the board apportioned the said assessment as follows: The county of Alameda the sum of $3,199,898.00; to the county of Butte the sum of $1,724,083.00; to the county of Fresno the sum of $2,339,389.00; to the county of Merced the sum of $1,408,001.00; to the county of Nevada the sum of $1,158.967.00; to the county of Placer the sum of $4,319,785.00; to the county of Sacramento the sum of $1,570,831.00; to the county of San Joaquin the sum of $2,174,260.00; to the county of Santa Clara the sum of $325,660.00; to the county of Shasta the sum of $1,647,457.00; to the county of Sierra the sum of $82,373.00; to the county of Stanislaus the sum of $867,022.00; to the county of Sutter the sum of $383,129.00; to the county of Tehama the sum of $1,553,207.00; to the county of Tulare the sum of $484,659.00; to the county of Yuba the sum of $608,027.00, and to the city and county of San Francisco the sum of $153,252.00

3 That the defendant is indebted to plaintiff for State and county taxes for the year eighteen hundred and eighty-four in the following sums: For State taxes, in the sum of one hundred and eight thousand four hundred and eighty dollars; for county taxes for the county of Alameda, in the sum of $19,002.82; for county taxes for the county of Butte, in the sum of $17,145.05; for county taxes for the county of Fresno, in the sum of $19,838.01; for county taxes for the county of Merced, in the sum of $11,939.84; for county taxes for the county of Nevada, in the sum of $22,576.67; for county taxes for the county of Placer, in the sum of $38,791.66; for county taxes for the county of Sacramento, in the sum of $11,606.14; for county taxes for the county of San Joaquin, in the sum of $8,556.02; for county taxes for the county of Santa Clara,

in the sum of $2,295.39; for county taxes for the county of Shasta, in the sum of $29,621.27; for county taxes for the county of Sierra, in the sum of $1,686.99; for county taxes for the county of Stanislaus, in the sum of $5,184.79; for county taxes for the county
4 of Sutter, in the sum of $2,099.54; for county taxes for the county of Tehama, in the sum of $27,050.91; for county taxes for the county of Tulare, in the sum of $4,594.56; for county taxes for the county of Yuba, in the sum of $7,762.87, and for the city and county of San Francisco, in the sum of $1,724.08, with five per cent. added to each of said several sums for non-payment of taxes and also for interest on each of said several sums at the rate of two (2) per cent. per month from the 29th day of December, 1884; and also for costs and counsel fees as provided by law.

Wherefore plaintiff demands judgment for said several sums, and prays that an attachment may issue in form as prescribed in section five hundred and forty of the code of civil procedure.

D. M. DELMAS,
Attorney for Plaintiff and the Controller.

Endorsed: Filed February 26th, 1885. Jas. J. Flynn, clerk, by J. D. Ruggles, deputy clerk.

5 *Appointment of Attorney for Plaintiff.*

In the Superior Court of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY.

D. M. Delmas, Esq., is hereby authorized to appear as attorney for the plaintiff in the above-entitled cause.

Dated Sacramento, Cal., February 18, 1885.

[SEAL.] JOHN P. DUNN,
State Controller.

Endorsed: Filed Feb. 26, 1885. Jas. J. Flynn, clerk, by J. D. Ruggles, deputy clerk.

6 *Answer.*

In the Superior Court of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } No. 14511.

Now comes the defendant, and answering the complaint of plaintiff filed herein—

I.

It denies each and every allegation in said complaint had, made, or contained; denies that it now is or for more than a year last past

has been or ever has been a corporation organized or existing under the laws of the State of California, or during all that time or at any time has been or still is the owner of or operating a railroad in the counties of Alameda, Butte, Fresno, Merced, Nevada, Placer, Sacramento, San Joaquin, Santa Clara, Shasta, Sierra, Stanislaus, Sutter, Tehama, Tulare, Yuba, or the city and county of San Francisco, in said State, except as hereinafter specifically set out; denies that on 16th day of August, eighteen hundred and sixty-four, or on any other day or year, the State board of equalization assessed the franchise, roadway, road-bed, rails, or rolling stock of the defendant at the sum of twenty-four million (24,000,000) dollars or any other sum; denies that said board apportioned the said pretended or any assessment to the county of Alameda in the sum of $3,199,898.00 or any other sum; to the county of Butte in the sum of $1,724,083.00 or any other sum; to the county of Fresno in the sum of $2,839,389,00 or any other sum; to the county of Merced in the sum of $1,408,001.00 or any other sum; to the county of Nevada in the sum of $1,158,967.00 or any other sum; to the county of Placer in the sum of $4,319,785.00 or any other sum; to the county
7 of Sacramento in the sum of $1,570,881.00 or any other sum; to the county of San Joaquin in the sum of $2,174,260.00 or any other sum; to the county of Santa Clara in the sum of $325,660.00 or any other sum; to the county of Shasta in the sum of $1,647,457.00 or any other sum; to the county of Sierra in the sum of $82,373.00 or any other sum; to the county of Stainslaus in the sum of $867,022.00 or any other sum; to the county of Sutter in the sum of $383,129.00 or any other sum; to the county of Tehama in the sum of $1,553,207.00 or any other sum; to the county of Tulare in the sum of $484,659.00 or any other sum; to the county of Yuba in the sum of $608,027.00 or any other sum; or to the city and county of San Francisco in the sum of $153,252.00 or any other sum.

Denies that said defendant is indebted to said plaintiff for State or county or any taxes for the year eighteen hundred and eighty-four or for any other year in any sum or sums whatever.

8 Denies that it is indebted to said plaintiff for State or any taxes in the sum of one hundred and eight thousand four hundred and eighty ($108,480.00) dollars or any other sum; or for county taxes for the county of Alameda in the sum of $19,002.82 or any other sum; or for county taxes for the county of Butte in the sum of $17,145.05 or any other sum; or for county taxes for the county of Fresno in the sum of $19,838.00 or any other sum; or for county taxes for the county of Merced in the sum of $11,939.84 or any other sum; or for county taxes for the county of Nevada in the sum of $22,576.67 or any other sum; or for county taxes for the county of Placer in the sum of $38,791.66 or any other sum; or for county taxes for the county of Sacramento in the sum of $11,606.14 or any other sum; or for county taxes for the county of San Joaquin in the sum of $8,556.02 or any other sum; or for county taxes
9 for the county of Santa Clara in the sum of $2,295.39 or any other sum; or for county taxes for the county of Shasta in the

sum of $29,621.27 or any other sum; or for county taxes for the county of Sierra in the sum of $1,686.99 or any other sum; or for county taxes for the county of Stainlaus in the sum of $5,184.79 or any other sum; or for county taxes for the county of Sutter in the sum of $2,099.54 or any other sum; or for county taxes for the county of Tehama in the sum of $27,050.91 or any other sum; or for county taxes for the county of Tulare in the sum of $4,594.56 or any other sum; or for county taxes for the county of Yuba in the sum of $7,762.87 or any other sum; or for city and county taxes for the city and county of San Francisco in the sum of $1,724.08 or any other sum.

Denies that it is indebted to plaintiff in the sum of five
10 or any per cent. added to each or any of said several sums for non-payment of said or any taxes; denies that it is indebted to plaintiff for interest on each or any of said several sums at the rate of two or any per cent. per month from the 29th day of December, 1884, or from any other day or year, or for costs or counsel fees, as provided by law, or at all. Defendant refers to — makes part of this subdivision the matter stated in subdivision- 2 to 35 of this answer.

11 And for further and separate answer defendant avers as follows:

II.

Defendant a Corporation—Its Place of Business—Line of Road—Stockholders.

The defendant is a corporation existing under the laws of the United States and of the State of California (as will hereafter more fully appear), and as such has been for many years past and still is (except in the respect hereinafter stated) the owner of a line of railroad, known as the Central Pacific railroad, extending from the Pacific Ocean across the State of California and the State of Nevada to Ogden, in the Territory of Utah. The principal place of business of defendant now is and for many years last past has been in the city of San Francisco, State of California. Some of its stockholders and members now are and ever have been citizens of the United States resident in said State of California, and some of its stockholders and members now are and ever have been citizens of the United States resident in States other than the State of California.

III.

Length of Road in the Several Counties.

The total length of said railroad in said State of California is 602.22 miles, and the length thereof in the respective counties through which it passes is as follows: In the county of San Francisco, 4 miles; in the county of Alameda, 83.52 miles; in the county of Santa Clara, 8.50 miles; in the county of San Joaquin, 56.75 miles; in the county of Sacramento, 41 miles; in the county of Placer,

112.75 miles; in the county of Nevada, 30.25 miles; in the county of Sierra, 2.15 miles; in the county of Yuba, 15.87 miles; in the county of Sutter, 10 miles; in the county of Butte, 45 miles; in the county of Tehama, 40.24 miles; in the county of Shasta, 18.80 miles; in the county of Stanislaus, 22.63 miles; in the county of Merced, 36.75 miles; in the county of Fresno, 61.06 miles, and in the county of Tulare, 12.65 miles. The length of said road from the city of Sacramento through the counties of Sacramento, Placer, Nevada, and Sierra to the eastern boundary of said State is 186.25 miles.

IV.

Purpose of the Formation of the C. P. R. R. Co. of California.

On the 28th day of June, 1861, a corporation was formed and organized under the laws of the State of California under the corporate name of the Central Pacific Railroad Company of California. Said corporation was formed for the purpose of constructing, owning, and operating a line of railroad and telegraph, commencing at the city of Sacramento, in said State, and running thence through the counties of Sacramento, Placer, Sierra, and Nevada to the eastern boundary of said State, in the expectation that its proposed railroad would, when constructed, constitute part of a line of railroad extending from the Missouri river to the Pacific Ocean, which line was then supposed was about to be constructed under the legislative supervision and authority of the Government of the United States, and which line of railroad was afterwards so constructed.

V.

Act of Congress of July 1st, 1862—Pacific Railroad Act.

On or about the 1st day of July, 1862, the Government of the United States undertook to construct or to cause to be constructed a line of railroad from the Missouri river to the Pacific Ocean, and to that end Congress passed an act entitled "An act to aid in the construction of a railroad from the Missouri river to the Pacific Ocean and to secure to the Government the use of the same for postal, military, and other purposes." To said act defendant here refers by title, and makes it a part of this answer. (See United States Statutes, vol. 12, page 489.)

By said act certain persons therein named were made and erected into a corporation under the name and style of the "Union Pacific Railroad Company," and said corporation was authorized and empowered to construct, own, and operate a line of railroad and telegraph from the Missouri river to the Pacific Ocean.

12 VI.

Like Privileges and Immunities Granted to Defendant.

To facilitate the construction of said road the Government of the United States, by said act of Congress, adopted the said Central Pacific Railroad Company of California as the instrument or agent

of the United States, and conferred upon it the same powers and clothed it with the same privileges and immunities which it conferred upon and clothed the said Union Pacific Railroad Company with, except that the said Central Pacific Railroad Company of California was to commence the construction of said railroad at the Pacific Ocean and build east until it met the said Union Pacific railroad building west.

VII.

Act of Congress of July 2d, 1864—Amendment.

On or about the 2d day of July, 1864, Congress passed an act entitled "An act to amend an act entitled An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the Government of the United States the use of the same for postal, military, and other purposes, approved July 1, 1862." To said act defendant here refers by title and makes the same a part of this answer. (See 13 United States Statutes at Large, page 356.)

VIII.

Intent of Congress in Passing Acts of 1861 *and* 1864.

The intent and purposes of Congress in passing said acts was to secure the completion of a railroad from the Missouri river to the Pacific Ocean, and to secure the use thereof for all time to come to the Government of the United State for the transportation of its mails, troops, munitions of war, and public stores.

IX.

C. P. R. R. Co. Accepts Terms Offered by Congress.

Said Central Pacific Railroad Company of California filed in the Department of the Interior its acceptance of the terms and conditions of said act of Congress of July 1st, 1861, within the time therein designated.

X.

Transfer of Rights to W. P. R. R. Co.

On or about the 31st day of October, 1864, said Central Pacific Railroad Company of California sold and assigned all its rights under the aforesaid acts to a corporation then existing under the laws of the State of California and known as the Western Pacific Railroad Company, so far as said rights related to the construction of said railroad and telegraph between the cities of San Jose and Sacramento, in said State of California. Said assignment was ratified and confirmed by the United States by an act of Congress passed on the 3d day of March, 1865, entitled "An act to amend an act entitled An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the Government the use of the same for postal, military, and other pur-

poses, approved July 1st, 1862, and to amend an act amendatory thereof, approved July 2d, 1864." To said act defendant here refers by title and makes the same a part of this answer. (See 13 United States Statutes at Large, page 504.)

XI.

Railroad Completed.

The said line of railroad from the Pacific Ocean to Ogden, in Utah Territory, was completed and put in operation in 1869, and has been in operation from that time until the present, and still is in operation, and the whole of the railroad mentioned in the said acts of Congress have long since been completed and is now, in accordance with the spirit and intent of said acts of Congress, operated as one continuous line from the Missouri river to the Pacific Ocean, and is so operated and maintained for the uses and purposes men-
13 tioned in said acts, and the corporations in charge thereof, including this defendant, are agents of the Federal Government charged to carry out the purposes of said Government as expressed in said acts of Congress.

XII.

Consolidation.

In August, 1870, acting under the said acts of Congress, said Central Pacific Railroad Company of California and the said Western Pacific Railroad Company formed themselves into one corporation under the name of the Central Pacific Railroad Company. Said company is the defendant herein, and, as the agent and instrument of the Federal Government, has, from the completion of said railroad as aforesaid until the present time, owned (except in the respect hereinafter stated) and operated said railroad under and by virtue of said acts of Congress and for the uses and purposes therein mentioned.

XIII.

Indebtedness Secured by Mortgage.

The bonds loaned by the United States under said acts of Congress of July 1st, 1862, and July 2d, 1864, to said Central Pacific Railroad Company of California were about twenty-seven millions of dollars. No part of said loan, except the accruing interest thereon, has been paid, but the same now is and for more than five years last past has been outstanding. To secure the payment of the same the United States now have and ever since the issue of said bonds have had a lien by mortgage upon the said railroad, its rolling stock, fixtures, and franchises. By said act of Congress of July 2d, 1864, said Central Pacific Railroad Company of California was authorized to issue its bonds in an amount equal to said United States bonds and to secure the payment of the same by a mortgage upon its said road, telegraph, franchises, and properties. Under the provisions of

said act said bonds, to the amount of more than five thousand dollars per mile, were issued before the first day of January, 1875, and the payment of the same was secured by a mortgage made by said company upon its said railroad, rolling stock, and franchises. Said bonds are unpaid and outstanding, but are not yet due, and the same now are and ever since their issue have been secured by the mortgage aforesaid. Many of said bonds now are and ever have been owned by citizens and *bona fide* residents of the State of California, while other of said bonds now are and ever have been owned by citizens of the United States *bona fide* residents of States other than California.

XIV.

Land Mortgage.

To further aid in the construction of its railroad hereinbefore described the defendant, on the first day of October, A. D. 1870, made, executed, and delivered a mortgage covering all its said lands acquired under the acts of Congress aforesaid in the sum of ten million of dollars. Said mortgage was duly acknowledged and filed for record in the office of the county recorder of the several counties in which said land is situated, a copy of which is hereto annexed, marked "Exhibit A," and made a part hereof. To secure the payment of said mortgage the defendant issued bonds in the amount of ten million of dollars. A part of said bonds have been redeemed, but there still remains due and unpaid $4,903,000, which is a valid and subsisting lien upon all of said lands. Said unpaid bonds now are and ever have been owned and held by citizens and *bona fide* residents of the State of California, and some of said bonds now are and ever have been owned by citizens of the United States *bona fide* residents of States other than the State of California.

The lands covered by said land mortgage are situate in the States of California and Nevada and the Territory of Utah. The aggregate amount of said lands in the State of California is 457,726.26 acres. Said lands are situated in the following counties in the quantity herein set out as follows: In Sacramento county, 217 acres; in Placer county, 19,930 acres; in Nevada county, 23,681 acres; in Sierra county, 9,667 acres; in Yuba county, 27,838 acres; in Sutter county, 2,879 acres; in Butte county, 128,500 acres; in Tehama county, 119,692 acres; in Shasta county, 82,844 acres; in Colusa county, 280 acres; in El Dorado county, 35,036 acres; in Plumas county, 7,163 acres; in Yolo county, $\frac{26}{100}$ of an acre.

14 XV.

Mortgaged Lands—Mode and Manner of Assessment—Payment of Taxes.

The lands mentioned in the preceding subdivision are not, and never have been, in any way connected with the railroad business of the defendant. They are agricultural and grazing lands, held, owned, and used for farming and grazing purposes.

Said lands and all of them for each of the years 1880, 1881, 1882, 1883, and 1884 were assessed by the assessors of the respective counties in which they are situated at their full cash value, and no deduction from said value was made or allowed on account of said mortgage or the indebtedness secured thereby; on the contrary, the laws of the State of California under which said assessors acted in making said assessments prohibited any deduction from said values on account either of the mortgages or the indebtedness secured thereby.

In each of said years the defendant paid in full, at the time the same became payable, all the taxes levied upon said lands, amounting in the aggregate, for State, county, and municipal purposes, to over 130,000.00.

The laws of the State of California, then and ever since in force, provide that in the assessment and valuation of lands of like character and situation, and in every respect similar, both in quality and use, not owned by railroad or other quasi-public corporations, a mortgage thereon by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, and that in the assessment and valuation of such property for the purposes of taxation the value of said mortgages shall be deducted therefrom, and the owner of said lands or property only assessed and taxed for the value in excess of the value of the mortgage.

To assist the assessor in the performance of his duties, and to enable him to make the deductions aforesaid, the laws of the State of California make it the duty of the recorder of each county annually, on or before the first Monday in April, to transmit to the assessor a complete abstract of all mortgages by which any debt is secured remaining unsatisfied on the records of his office at 12 o'clock meridian, on the first Monday of March of said year; and it is further provided by said laws that should any such list be found to contain any instrument relating to lands situated in more than one county it shall be the duty of the assessor to transmit to the State board of equalization all information relating thereto, and it shall be the duty of the State board to attach an apportionment of valuation of such instrument to be assessed in each county, and to transmit to the assessor of each county mentioned as affected in said instrument a statement of valuation of assessment to be levied against said instrument in such county. (Political Code, sect. 3678.)

In the matter of the valuation of its said lands for the purposes of taxation the defendant is and ever has been deprived of all the benefits of the said laws which provide for the deduction of indebtedness secured by mortgage from the valuation of lands by reason of the provisions of section 4 of article XIII of the constitution of the State of California, and the action of assessors in pursuance thereof, while all natural persons and all corporations, not *quasi* public within the State of California, are entitled to receive and do receive the full benefit of said laws and the deductions required to be made thereunder.

XVI.

Property Belonging to the U. S. Exempt from Taxation.

That under said constitution all property belonging to the United States is exempt from taxation.

XVII.

Assessment by State Board of Equalization.

On the 16th day of August, 1884, the State board of equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section 10 of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, and rolling stock of said railroad against defendant. Said pretended assessment was not made separately upon the franchise, roadway, road-bed, rails, and rolling stock or any properties of said railroad, but all of said properties were blended together in making said assessments, which assessments *was* then and there so entered upon the minutes of said board. Said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based, and no other assessment than the aforesaid was ever made of said property or any part thereof for said fiscal year. Said assessment included all property and kinds of property mentioned in section 3665 of the Political Code of California as amended March 9th, 1883, except depots, stations, shops, and buildings erected upon the space covered by the right of way, which last-mentioned property was assessed as provided in said section by local assessors.

XVIII.

State Board Pretended to Assess the Whole of Said Property to Defendant.

The State board of equalization, in making the said pretended assessment, pretended to assess to and against defendant the full cash value of said railroad, roadway, road-bed, rails, rolling stock, and franchises, as prescribed in said section 3665, without deducting therefrom the value of the mortgage or any part thereof given and existing thereon as aforesaid to secure the indebtedness of said company to the holders of said bonds, notwithstanding, as defendant avers, they had full knowledge of the existence of such mortgage.

XIX.

State Board Did Not Treat Said Mortgage as an Interest in the Property.

In making said pretended assessment the said State board of equalization did not deem or treat said mortgages as an interest in said property, but did assess the whole value of said property to the defendant in the same manner it would have done had there been no mortgages thereon.

16

XX.

Authority Exercised by State Board Violates Provisions of Fourteenth Amendment.

Under the constitution of the State of California the board of supervisors of the several counties of the State constitute boards of equalization for their respective counties, whose duty it is to equalize the valuation of the taxable property in the county, except the franchise, roadway, road-bed, rails, and rolling stock of railroads operated in more than one county of the State; and to such boards the owners of all property, except as above stated, have the right and privilege to apply for the correction of their assessments and have the right and privilege of a hearing before the said local boards boards of equalization. By the provisions of the constitution of California and the laws in pursuance thereof this right and privilege or any right or privilege to be heard in relation to assessments is denied to defendant in respect to the property in question; all of which defendant avers is contrary to the provisions of the fourteenth amendment to the Constitution of the United States, which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

XXI.

Further Violation of the Fourteenth Amendment.

The power conferred upon the State board of equalization by section ten of article XIII of the constitution of California violates the provision of the fourteenth amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty, or property without due process of law, for that said section as to such power is self-executing and complete and does not provide for personal or other notice to be given to the parties to be affected by the exercise of such power, and does not provide for a full or any opportunity of time, place, or tribunal for such parties to be heard in defense of their rights, and hence, under and by said provision of the constitution of the State of California, the liability of owners of such property to taxation and the amount thereof may be fixed without notice to them or an opportunity to be heard.

XXII.

Further Discrimination.

The provisions of section four of the constitution of the State of California providing for the assessment of the property of railroad and other quasi-public corporations is in contravention of the provisions of said fourteenth amendment of the Constitution of the United States, in that it discriminates against such corporations, in this, that whereas under said section four of said article XIII of the constitution of the State of California, if the property of natural per-

sons or corporations not quasi-public has a mortgage, lien, or incumbrance thereon, they are not liable to assessment or taxation upon such property, but only upon the value of their interest in such property over and above the value of such mortgage, lien, or incumbrance; whereas, in the case of the property of railroad and other quasi-public corporations, no such allowance or deduction is made, had, or allowed with respect to any mortgage, lien, or incumbrance there may be upon such property; and also in this, that while the tenth section of article XIII of the constitution of the State of California provides the same mode for the assessment of the franchises, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county, whether such property be owned by railroad or other quasi-public corporations or by private corporations or by natural persons, yet section four of article XIII of said constitution permits or allows indebtedness secured by mortgage,
17 trust deed, or otherwise to be deducted from the value of such property only when it is owned by natural persons or corporations not quasi-public, and denies such deduction when the property is owned by railroad or other quasi-public corporations.

XXIII.

Section 10 of article XIII of said constitution of California provides that all property except the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in the State shall be assessed in the county, city, city and county, town, township, or district in which it is situated in the manner prescribed by law.

The laws of said State prescribe that all property, except that above mentioned, shall be assessed in the county in which it is situated by an assessor elected by the people of such county.

The assessors of the several counties in the State of California have, as the defendant is informed and believes and so avers, in each year since the adoption of said constitution, assessed all moneys, credits, bonds and stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership situated in their said counties, and all dues and credits held, owned, or in the possession of persons resident in said county to such persons.

Said assessors for each of said years have assessed to the owners and holders thereof in their respective counties the indebtedness of the defendant secured by the mortgage herein mentioned, but never has, nor does the law permit them so to do, made any deduction from the assessment of any of the property of this defendant on account of the assessments made as aforesaid to the holders of such indebtedness.

XXIV.

Further Discrimination.

All owners of railroad property operated in more than one county by virtue of said section ten of article XIII are denied any protection from the laws of the State of California, which—

(*a.*) Require that property shall be taxed in proportion to its value.

(*b.*) Require such proportions to be ascertained by a general law.

(*c.*) Require that, before liability be fixed, an opportunity to be heard must be given.

(*d.*) Give an appeal from the assessor to boards of equalization.

(*e.*) Require the assessment to be made in the county and prohibit its being made in localities distant from the *situs* of the property.

(*f.*) Which prescribe mode and manner of the assessment.

And defendant avers that at and before and ever since the adoption of the constitution of California now in force there were and are existing under the laws of said State corporations of various kinds formed for the purpose of and actually operating and doing business and holding and using and operating property in more than one county in said State, and that at all of said times there were and there now are divers natural persons residents of said State operating property in more than one county in said State, and that at all of said times there were and now are railroads owned by corporations formed under the general laws of said State, and also by natural persons, which are only operated in one county; that by the provisions of section ten of article XIII of said State constitution persons operating railroads in more than one county in the State have been singled out from all other persons operating property in more than one county and denied the right, common to all other persons, to appeal for relief from overvaluations of their property by assessors to the local board of equalization and denied the rights and privileges accorded by the laws to all other persons in that respect.

Corporations in said State of California now are and ever have been formed under general laws relating thereto, and railroad and all other corporations, except public corporations formed or organized for the government of a portion of the State, now are and ever have been designated by the laws of California as private corporations. Under the provisions of the laws relating to the formation of private corporations such corporations may be formed for any purpose for which individuals or natural persons may lawfully associate themselves together, and there now exists in Cali-
18 fornia and ever have existed corporations formed under said laws for fire, marine, mutual life, health, and accident insurance; building, constructing, and operating railroads, wagon roads, telegraphs, bridges, ferries, wharves, chutes, and piers, and for constructing and operating canals; for the purpose of acquiring lands in large tracts and distributing them as homesteads among the corporators; for savings and loans; for mining; for the sale and distribution of

water in cities and towns; for manufacturing, mechanical, and agricultural purposes; for benevolent, charitable, and educational purposes; for cemeteries, agricultural fairs, and various other purposes.

In said State of California there now are and for more than three years last past have been various railroads owned, operated, and controlled either by individuals, partnerships, or by private corporations other than railroad corporations, to wit, by mining and manufacturing corporations. There now is and for more than three years last past has been a railroad in use and operation extending from the city of Marysville, in the county of Yuba, to the town of Oroville, in the county of Butte, in said State, a distance of twenty-seven miles, which said road now is and ever has been operated in more than one county in this State, and is of the same gauge as the road of this defendant, and has ever been operated for like uses and purposes.

Said road with all its equipments now is and for more than three years last past has been in the owership and under the operation and control of one N. D. Rideout, a citizen of the United States and resident of the State of California.

There now is and for more than three years last past has been a railroad extending from the town of Santa Cruz, on the Pacific Ocean and in the county of Santa Cruz, eastward through said county and into the county of Monterey to the town of Pajaro, a distance of about twenty-one miles. Said road now is and for a long time past has been owned, operated, and used for like purposes for which the defendant's road is owned, operated, and used, and that the same now is and for a long time past has been in the ownership and operated by the Pacific Improvement Company, a private corporation formed under the laws of the State of California, which said corporation is not and never has been a railroad or quasi-public corporation.

There now are and for more than five years last past have been divers other railroads owned and operated in said State by corporations other than railroad corporations and by individuals and partnerships, and that all of said corporations, individuals, and partnerships are the owners of lands which are assessed by the local assessors of the various counties in which such lands are situated, and all are entitled under the laws of said State to the deductions provided for in said laws, and, as said defendant, upon information and belief avers, have been allowed such deductions.

XXV.

System Adopted by said Board Violates Rules of Equality.

The State board of equalization in making said pretended assessment of the said roadway of defendant did willfully and designedly include in the valuation of said roadway the value of fences erected upon the land of coterminous proprietors; and did willfully and designedly value the said roadway at a greater value than the value of other property similarly situated and greater than its actual

value, upon the ground that such increased valuation should be made because the title of defendant thereto was acquired by condemnation.

The value of such fences, which were not the property of defendant nor the property of the owners of said roadway, and the increased value affixed to the roadway by the system adopted by the board, are blended in said pretended assessment, and there is no mode or means by which such illegal valuation can be separated from those which may be legal.

Defendant, upon its information and belief, avers that the said State board of equalization adopted a system of valuation in respect to all the property mentioned and referred to in section 10 of article XIII of the constitution, which defines the power of said board, which system was by said board intended to and which did operate unequally and which was intended to and did violate the rule prescribed by said section—that all of such property should be assessed at its actual value. The system so adopted was applied by the said board in making said pretended assessment of said property and in making the assessment of all property in the State over which the pretended authority of said board extended.

XXV (*a*).

Value of Ferry-Boats Blended with Other Values.

The western terminus of the said railroad of defendant is in the city of San Francisco, on the west side of the Bay of San Francisco. The distance across said bay is five miles, and the whole thereof is part of the navigable waters of said bay. The cars of the company are transported from the end of the railroad track of said road on the eastern side of said bay to the end of the railroad track on the western side of said bay on steam ferry-boats belonging to the defendant, built, owned, and constructed for that purpose, and are of great value. For more than four years past the defendant has been the owner of two steam ferry-boats, one of the tonnage of 1,566 tons and one of the tonnage of 1,012 tons, and during the whole of that time has used said boats for the purposes aforesaid. Said boats now are and for more than four years last past have been of a class which are by law required to be registered and now are and for more than four years last past have been duly registered and enrolled in the city and county of San Francisco, State of California. The State board of equalization, in making said pretended assessment of the said roadway, road-bed, rails, and rolling stock of defendant, did willfully and designedly include in the valuation thereof the value of said boats, and the value of said boats is blended in said pretended assessment with the value of said roadway, rails, road-bed, and rolling stock, and there is no means by which such value can be separated from the valuation placed by said board upon said roadway, road-bed, rails, and rolling stock or either of them.

19 Said system was to include within the value of the roadway the value of the fences owned and possessed by cotermi-

nous proprietors, and to value said roadway at double its actual value, because the right thereto was acquired by condemnation. Said system relative to the rolling stock of railroads was to value the same at sixty per cent. above its actual cost when new, and to value such rolling stock at double its actual value. Said system relative to the franchise was to value it at $2,000 per mile, when the actual value, as the board well knew, of said franchise as an entirety did not exceed twenty-five dollars; said system as to the valuation of other property to be assessed by the said board was to value it at double its actual value; said system was by the said board adopted and was by it applied in making all assessments made by it with the intent and purpose wrongfully and unlawfully to cause the owners of property assessed by it to pay double the rate of State and county taxes paid by the owners of property assessed by local assessors; and defendant avers, upon its information and belief, that the said board applied the said system in making the pretended assessment against the property upon which the taxes mentioned in the complaint are based; and defendant, upon its information and belief, avers that the said State board of equalization in making said pretended assessment did not value any of said property at its actual value, but did intentionally and for the purpose of making defendant pay an unequal proportion of State and county taxes, assess the said property at double its actual value; and defendant avers that the general rule in this State has been to assess property at not over two-thirds its cash or actual value, and that this rule was adopted and acted upon by all local assessors in the State and by the said State board except in the exercise of the power conferred by section 10, art. XIII of the State constitution, for said fiscal year, and that all property save that assessed by the said State board under said section has been valued and assessed at one-third less than its actual value, and that the taxes have been collected on valuations so made.

XXVI.

Defendant's Franchise a Federal One.

And defendant, upon its information and belief, avers that under and by virtue of the said several acts of Congress defendant became and ever since has been a Federal corporation, and has held its franchise and exercised all its corporate powers under the Government of the United States.

XXVII.

Corporate Powers in Part Derived from Acts of Congress.

And defendant, upon its information and belief, avers that if by virtue of the several acts of Congress herein referred to it did not become a Federal corporation, yet it holds under the Government of the United States all the corporate powers and franchises granted to it by the said several acts of Congress as the trustee of the said Government and for the governmental uses and purposes specified in said acts.

XXVIII.

That the Franchise of Defendant is not Subject to State Taxation.

Under and by virtue of the said several acts of Congress hereinbefore referred to the defendant was by the Government of the United States selected as the means and instrument of that Government to construct the railroad hereinbefore described, and to keep and maintain the same in repair, to the end that the said Government might, when occasion required, use the same for the transportation of its armies and military stores, and for such other purposes as said Government might, in the execution of its powers, desire to use the same. The Government of the United States has never given to the State of California the right to lay any tax upon the franchise, existence, or operations of defendant. Such a tax would hinder and impede the lawful operations of the Government of the United States; would hinder, delay, and prevent the defendant from performing, as aforesaid, its obligations to the United States, and would nullify and prevent the enforcement of the said several acts of Congress.

XXIX.

Whole Franchise Assessed.

Said pretended assessment made by the State board of equalization is upon all of the franchises of defendant, and the said board, in valuing the same, included the value of all the franchises and corporate powers held and exercised by defendant under said acts of Congress.

20 XXX.

Tax upon the Franchise Blended with Tax upon Other Property.

The State board of equalization in making said pretended assessment included and assessed the franchise of defendant, and in making said pretended apportionment included in the valuation affixed to the property of defendant the value thereof, but such value was not separately stated in said apportionment nor upon any assessment roll or delinquent list, but such value is in said pretended apportionment and upon the assessment roll and delinquent list blended with the values affixed to the roadway, road-bed, etc., and cannot on either be distinguished or separated from such other values, and the tax upon said franchise is in like manner blended with and cannot be separated from the tax on said roadway, road-bed, etc.

XXXI.

Valuation Excessive.

Neither the franchise, roadway, road-bed, rails, or rolling stock were assessed by the State board of equalization in said pretended assessment at their actual value, or in proportion to their value, but

were wilfully and intentionally assessed greatly in excess and out of proportion to such value and greatly in excess of and out of proportion to the rate at which all other property in said State is valued for the purposes of taxation, to wit, one hundred per cent. in excess thereof.

XXXII.

Sole Authority upon Which Tax is Based.

Said pretended assessment is the only assessment of said property, and the pretended tax for non-payment of which this action is brought is founded upon said pretended assessment and upon no other assessment.

XXXIII.

State Tax Void.

The defendant, upon its information and belief, avers that the State board of equalization never at any time did for the said fiscal year fix or determine any rate of taxation for State purposes, and that the sum and the whole thereof claimed in the complaint for State taxes for said fiscal year is illegal and void.

XXXIV.

Plaintiff's Causes of Action Based upon Assessment by State Board of Equalization.

On the 16th day of August, 1884, the State board of equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section ten of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, and rolling stock of the railroad hereinbefore described and known as the Central Pacific railroad against this defendant; that said pretended assessment was not made separately upon the franchise, roadway, road-bed, rails, and rolling stock of said railroad, but all of said properties were blended together in making said assessment, which assessment was then and there so entered upon the minutes of said board. Said pretended assessment is the assessment upon which the several taxes mentioned in plaintiff's complaint are claimed to be due, and that no other assessment than such pretended assessment was ever made against or upon said property or any part thereof.

21 XXXV.

Tender.

On the 27th day of December, 1884, the defendant, while then and now denying all liability upon said pretended assessment and claiming that all of the proceedings had in relation thereto were in vio-

lation of law and the rights of this defendant, tendered and offered the said plaintiff the sum of $169,685.00 in United States gold coin in part payment of the tax claimed, with an agreement that the receipt of said sum should not prejudice the plaintiff in any legal rights, and defendant now brings said sum into court and offers the same to plaintiff, and, if refused by plaintiff, subjects the said sum to such orders or judgments as the court may make in the premises; and defendant avers that of the sum so tendered it tendered specifically for the benefit of the State and on the amount claimed
22 by the State the sum of $52,833.60, and on account of the various county taxes claimed it tendered sums as follows, to wit: For the county of Alameda the sum of $9,691.44; for the county of Butte the sum of $8,743.98; for the county of Fresno the sum of $10,117.38; for the county of Merced the sum of $6,089.31; for the county of Nevada the sum of $11,514.10; for the county of Placer the sum of $19,783.75; for the county of Sacramento the sum of $4,717.45; for the county of San Francisco the sum of $879.28; for the county of San Joaquin the sum of $4,363.57; for the county of Santa Clara the sum of $1,170.65; for the county of Shasta the sum of $15,106.85; for the county of Sierra the sum of $860.37; for the county of Stanislaus the sum of $2,644.24; for the county of Sutter the sum of $1,070.77; for the county of Tehama the sum of $13,795.97; for the county of Tulare the sum of $2,343.23; for the county of Yuba the sum of $3,959.06, and ever since has and now keeps said tender good.

23 XXXVI.

No Rules or Regulations.

Said State board of equalization has never at any time made or adopted any rule or regulation relative to the assessment or valuation of railway property of any kind, nor has it ever made or adopted any rule to govern or regulate its proceedings in the exercise of the powers conferred upon it by section 10 of article XIII of the constitution of California.

Wherefore defendant prays it be hence dismissed with costs.

H. S. BROWN,
Attorney for Defendant.

S. W. SANDERSON AND
CREED HAYMOND, *Of Counsel.*

24 *Verification.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

E. H. Miller, Jr., being first duly sworn, on oath says that he is an officer, to wit, the secretary of the corporation defendant herein; that he has read the foregoing amended answer and knows the contents thereof; that the same is true of his own knowledge, except as

to those matters therein stated on his own information or belief, and as to those he believes it to be true.

E. H. MILLER, JR.

Subscribed and sworn to before me this 27th day of March, A. D. 1885.

[SEAL.] J. F. KINGWELL,
Notary Public in and for the City and County of San Francisco, State of California.

25 "EXHIBIT A."

This indenture, made this the first day of October, A. D. 1870, between the Central Pacific Railroad Company, a railroad corporation duly incorporated and organized under and pursuant to the laws of the State of California, party of the first part, and Charles Crocker and Silas W. Sanderson, both of the city of Sacramento and State of California, parties of the second part, witnesseth:

That whereas, by an act of the Congress of the United States of America, approved on the first day of July, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the Government the use of the same for postal, military, and other purposes," and an act amendatory thereof, approved on the second day of July, 1864, there was granted to the Central Pacific Railroad Company of California, a railroad corporation then being duly incorporated and organized under and pursuant to the laws of the State of California, a large body of the public lands of the United States, to wit, every alternate section of public land, designated by odd numbers, to the amount of ten alternate sections per mile on each side of the railroad and telegraph line of said company, running from Sacramento, in the State of California, to their junction with the railroad and telegraph line of the Union Pacific Railroad Company, at or near Ogden, in Utah Territory, a distance of seven hundred and forty miles, not sold, reserved, or otherwise disposed of by the United States, and to which no pre-emption or homestead claim had attached at the time the line of said railroad was definitely fixed, and not containing minerals other than coal and iron, for the purpose of aiding in the construction of said railroad and telegraph line and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores of the United States;

And whereas, by an act of Congress of the United States of America, approved on the twenty-fifth day of July, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad, in California, to Portland, in Oregon," there was granted to the California and Oregon Railroad Company, a railroad corporation then duly incorporated and organized under and pursuant to the laws of the State of California, a large body of the public lands of the United States, to wit, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile

(ten on each side) of the railroad and telegraph line of said company, running from a point on the line of the Central Pacific railroad at or near Roseville, in the county of Placer and State of California, to the northern boundary of said State, a distance of two hundred and forty-six miles, for the purpose of aiding in the construction of said railroad and telegraph line and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores of the United States, with a further provision to the effect that when any of said alternate sections shall appear to have been previously granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, may be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first alternate sections;

And whereas, heretofore, to wit, on the twenty-second day of June, A. D. 1870, the said Central Pacific Railroad Company of California, pursuant to a statute of the State of California in such case made and provided, was consolidated with the Western Pacific Railroad Company, a railroad corporation then duly incorporated and organized under the laws of the State of California and owning and operating a railroad and telegraph line from the city of Sacramento to the cities of Oakland and San Jose, in the State of California, a distance of one hundred and fifty miles, into a new corporation under the corporate name and style of the "Central Pacific Railroad Company;"

And whereas, heretofore, to wit, on the twentieth day of August, A. D. 1870, the said last-named corporation, the said California and Oregon Railroad Company, the San Francisco, Oakland and Alameda Railroad Company, a railroad corporation then existing, duly incorporated, and organized under the laws of said State and owning and operating a railroad running from San Francisco, through the city of Oakland, to Haywards, in Alameda county, a distance of twenty-five miles, and the San Joaquin Valley Railroad Company, a railroad corporation duly incorporated and organized under the laws of said State and then existing by virtue thereof, owning a line of railroad and telegraph running from a point on the road of the said Central Pacific Railroad Company at Lathrop, in the county of San Joaquin, to the town of Visalia, in the county of Tulare, in said State, a distance of one hundred and fifty-two miles, said railroad and telegraph being then only partially constructed, did, pursuant to a statute of said State in such case made and provided, amalgamate and consolidate themselves into a new corporation under the corporate name of the "Central Pacific Railroad Company," which last-named corporation is the said party of the first part to this indenture;

And whereas, by force and effect of said consolidation, the said party of the first part has succeeded to the title to all of said lands and now owns and holds the same;

And whereas the said party of the first part desires to raise money for the purpose of completing the construction and equipment of

said railroad and telegraph line from the town of Roseville aforesaid to the northern boundary of the State of California, and also for the purpose of completing the construction and equipment of said railroad and telegraph line from the town of Lathrop aforesaid to the town of Visalia aforesaid, and also for the payment of
26 the debts and liabilities of said party of the first part, and to that end has, by its board of directors, considered and determined to issue the bonds of said company in the sum of one thousand dollars each to the number of ten thousand, payable to the said parties of the second part or to the holder thereof twenty years from date, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of April and October of each year ensuing its date, payable, both principal and interest, in United States gold coin, in the city of New York; and to secure the payment of said bonds did further consider and determine to mortgage the lands hereinbefore described, except so much thereof as is or shall be included in the rights of way of the railroads and telegraph lines of said company as defined and granted by the acts of Congress aforesaid or is being or shall be used in the construction or operation thereof or for the track, yards, depot grounds, buildings, or erections thereof, to the said parties of the second part in trust for the holders of said bonds;

And whereas it was further considered and determined that said bonds and each of them should bear date on the first day of October, A. D. 1870, and should have attached thereto forty interest coupons, numbered from one to forty, inclusive, in the following form:

$—. CENTRAL PACIFIC RAILROAD COMPANY. No. —.

For Land Bond No. —.

INTEREST COUPON FOR THIRTY DOLLARS, DUE

—— 1st, 18—.

Payable in the city of New York. } —— ——, *Secretary.*

And whereas it was further considered and determined that said bonds and each of them should be of the following tenor and form:

Land Bond of the Central Pacific Railroad Company.

No. —. $1,000.

The Central Pacific Railroad Company acknowledges itself indebted to Charles Crocker and Silas W. Sanderson, both of the city of Sacramento and State of California, or to the holder hereof, in the sum of one thousand dollars, gold coin of the United States, which sum it promises to pay to the holder hereof in the city of New York twenty years from the date hereof, with interest thereon at the rate of six per cent. per annum, payable semi-annually on the first days of April and October of each year ensuing the date hereof, both principal and interest payable in United State gold coin.

This bond is one of ten thousand, each of which is for the same sum of money and of like tenor and all of which are secured by a

mortgage to Charles Crocker and Silas W. Sanderson, as trustees for the holders thereof, on all the lands granted by the United States to the Central Pacific Railroad Company of California by an act of Congress, approved on the first day of July, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the Government the use of the same for postal, military, and other purposes," and an act amendatory thereof, approved on the second day of July, 1864; also all the lands granted to the California and Oregon Railroad Company by an act of Congress, approved on the twenty-fifth day of July, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad, in California, to Portland, in Oregon" (which lands are now owned by the said Central Pacific Railroad Company by force and effect of a consolidation between said companies pursuant to a statute of the State of California in such case made and provided), save and except so much of said lands as are or shall be included in the right of way for the railroad and telegraph lines of the said Central Pacific Railroad Company or is being or shall be used in the construction or operation thereof or for track, yards, depot grounds, buildings, or other erections thereof, and also so much thereof as may have been sold previous to the date of said mortgage, to wit, the first day of October, 1870.

In testimony whereof said company has caused its corporate seal to be hereunto affixed by its president and secretary on this the first day of October, A. D. 1870:

Now, therefore, this indenture witnesseth: That the said party of the first part, for the purpose of securing the payment of the sums of money mentioned in said bonds and the interest thereon, and in consideration of the premises and also for and in consideration of the sum of one dollar to the said party of the first part in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, released, enfeoffed, conveyed, and confirmed, and by these presents does grant, bargain, sell, release, enfeoff, convey, and confirm, unto the said parties of the second part, as trustees, and to their successors and survivor and their assigns forever—

All and singular the said several sections of land so as aforesaid granted by said acts of Congress, and also all the estate, right, title, interest, claim, and demand whatsoever, at law or in equity, of, in, or to the same, or any part or parcel thereof, which the said party of the first part now has, holds, owns, or is entitled to or hereafter may or shall acquire, have, hold, own, or be or become entitled to by force or virtue of the said acts of Congress, saving, excepting, and reserving all parts and parcels of said lands as have been sold here-
27 tofore or which are or shall be included in the rights of way of the said railroads and telegraph lines of said company, as defined and granted by the acts of Congress aforesaid, or used for the construction or operation thereof or for the track, yards, depot grounds, buildings, or erections thereof:

To have and to hold all and singular the lands hereby granted

or intended to be granted, and each and every part and parcel thereof with the appurtenances thereunto belonging, unto the said parties of the second part and their successors and survivor and their assigns forever, as trustees, for the uses and purposes and upon the trusts, terms, conditions, and agreements in this indenture set forth and declared

Provided always, and these presents are upon the express condition, That if the said party of the first part shall well and truly pay or cause to be paid to the holders of said bonds and every of them the principal sums of money therein mentioned according to the tenor thereof, with the interest thereon, at the times and in the manner hereinbefore provided according to the true intent and meaning of these presents, then and from thenceforth this indenture and the estate hereby granted shall cease and determine, and all the right, title, and interest in any and all property hereby conveyed to the parties of the second part not then disposed of under the powers hereby conferred shall revert to and vest in the said party of the first part.

This indenture further witnesseth That these presents and the said bonds are made, executed, and delivered upon the trusts, terms, conditions and agreement following—that is to say:

That all the lands hereinabove conveyed and mortgaged shall be under the sole and exclusive management and control of the said party of the first part, who shall have full power and authority to make contracts for the sale of the same at such price, on such credit or terms of payment, and such other conditions as shall be agreed on by the said parties of the first and second parts and as shall seem to them best calculated to secure the payment in full of all the bonds issued as hereinbefore provided until entry or foreclosure by the trustees, as hereinafter provided; but no title to any tract of land contracted to be sold by the said party of the first part shall be given until the whole of the purchase-money of said tract shall be paid to said parties of the second part or their successors or survivor in cash or in said bonds or overdue coupons thereof; and for this purpose it is agreed that the said party of the first part and said trustees shall cause all such lands as they shall from time to time become subject to sale to be carefully examined and surveyed and shall affix to each tract or parcel such price as in their judgment shall be most judicious, having in view the interests of all parties, and said lands shall be and remain at all times thereafter open for sale to any person who may desire to purchase and pay therefor, the prices being, nevertheless, at all times subject to revision and alteration by the said parties, and the party of the first part may reserve from sale any lands necessary for depot grounds or other purposes connected with the construction or operation of the said railroad or telegraph. The purchaser of any such land shall be at liberty to pay for the same in the aforesaid bonds or overdue coupons at par; and when any tract or parcel of said lands shall have been purchased and paid for either in bonds, coupons, or cash, as hereinbefore provided, the same shall be conveyed by the said parties of the first and second parts to the purchaser in fee simple, and shall by such conveyance

be absolutely and forever released from any and all lien or incumbrance for or on account of said bonds or any other debt or obligation of the said party of the first part. The said trustees shall and will cancel and discharge each and every bond and the coupons thereon and all overdue coupons which they may receive in payment for land or by purchase by defacing the seal of the corporation, perforating the signatures of the president and secretary, and drawing lines across each of the interest coupons on receipt thereof, and all bonds and coupons received in payment for lands as aforesaid shall, when so cancelled, be delivered to the said party of the first part.

The said trustees shall apply the proceeds of the sales made by them of lands hereby conveyed to the sole and exclusive purpose of the payment of the bonds provided for in and issued in conformity to the terms of this indenture; and for this purpose all such avails shall, from time to time as the same are realized, be used in the purchase of such bonds in the market, to be cancelled, so long as purchases thereof can be made at par; and whenever such bonds cannot be purchased at that rate said trustees shall advertise for proposals to sell such bonds to them in two newspapers published in the city of New York and one newspaper published in each of the cities of San Francisco and Sacramento, and after receiving such proposals they shall have power to purchase such bonds at the lowest terms so offered. The said party of the first part doth hereby covenant and agree to pay to the holders of said bonds, respectively, the said principal sums of money therein mentioned and the interest thereof as aforesaid. If any default shall be made in the payment either of principal or interest on any of said bonds for six months after demand at the place of payment when the same shall become due, then the said trustees may, on being requested by the holders of at least one hundred thousand dollars of such bonds, enter into and take possession of any of the lands above conveyed and foreclose this mortgage, and may sell at public auction so much of said lands as may be necessary to discharge all arrears of such interest and apply the proceeds, after deducting the costs, charges, and expenses of such entry, foreclosure, and sale, to the payment of such arrears of interest. If any such default shall continue for one year from the time of such demand and refusal the principal sum of all said bonds then outstanding shall become due and payable, and the said trustees may enter into and take possession of all the lands above by these presents mortgaged or conveyed, foreclose this mortgage, and sell at public auction all said lands, or so much thereof as may be necessary, first giving at least six months' previous notice of the time and place of sale in at least one newspaper published in the city of New York and in one published in each of the cities of San Francisco, Sacramento, Virginia, and Salt Lake, and they shall apply the proceeds thereof, after deducting the costs, charges, and expenses of such last-mentioned entry, foreclosure, and sale, to the payment of all said bonds then outstanding and the interest accrued thereon, rendering the overplus, if any there shall be, unto the said party of the first part. In case of any sale upon any such foreclosure or at any such public

auction, the said trustees shall make, execute, and deliver a conveyance of the said lands so sold, which shall convey to the purchasers all the rights and privileges of the said party of the first part in and to the property so sold to the same extent as the same shall have been previously enjoyed and held by the said party of the first part. If, after any such entry shall be made or any such foreclosure proceeding shall be commenced for the satisfying of interest
28 only, as above provided, and before the lands are sold thereon, the said party of the first part shall pay and discharge such interest and deliver the coupons therefor to the said trustees and pay all the costs, charges, and expenses incurred in such entry and foreclosure and the proceedings thereon, then and in every such case the said trustees shall discontinue their proceedings thereon and restore to the said party of the first part all such lands, to be held subject to the above conveyance and mortgage and subject to all the provisions, terms, and conditions of these presents in like manner as if such entry had not been made nor such foreclosure proceedings commenced.

In case a vacancy shall happen in the number of trustees hereinbefore mentioned as parties of the second part in this indenture, or if one of them shall be temporarily absent, the remaining trustee shall, while said vacancy or absence exists, have all the rights, exercise all the powers, and discharge all the duties devolving on the said trustees by this instrument; but, as soon as it conveniently may be done, such vacancy shall be filled by the nomination by the remaining trustee of some proper person to fill such vacancy, which nomination shall be submitted to the board of directors of said company, and, if approved by them, the person so nominated and approved immediately shall become a trustee under this instrument. If said nomination is not approved another person shall be nominated by said remaining trustee and in like manner submitted for approval, and so on till three nominations shall have been made; but if three successive nominations shall be made and none of them shall be approved by said board said vacancy shall be filled by a committee of three persons selected, one by said remaining trustee, one by said board of directors, and a third by the two thus selected, and the person appointed trustee by a majority of the committee shall be and remain a trustee under this instrument; and the person regularly appointed a trustee to fill a vacancy in either of the forms above specified shall, from and after his said appointment and his acceptance of the appointment, become vested with the same estate, powers, rights, and interests, and charged with the same duties and responsibilities as if he had been one of the original trustees, parties of the second part, named in and executing this instrument; and the prior remaining trustee may and shall execute such conveyances and instruments as may be proper or necessary to vest the same in such new trustee jointly with him or to furnish evidence of such vesting. If at any time either of the said trustees shall resign his place as trustee, by a proper deed or writing to that effect, and such resignation shall be accepted by the said party of the first part, then and in every such case the place of such resigning trustee thereupon shall become and

be vacant. Whenever all the bonds which shall have been made and issued by the said party of the first part under and in conformity to the provisions of this indenture, with the interest thereon, together with all the expenses incurred by the said trustees in the execution of the trust herein and hereby created, shall have been fully paid the said trustees shall reconvey to the said party of the first part all and singular the said lands then in the hands of the said trustees and not before that time sold or disposed of in the execution of the trust hereby created. In case the said trustees shall at any time have any trust moneys on hand derived from the sale of the lands hereby conveyed, which will not be required to meet any immediate liabilities of the company to which said moneys are by these presents devoted, the said moneys shall be deposited on interest with some bank or trust company in the city of San Francisco or Sacramento, subject to be drawn by checks signed by the trustees or such one of them as they may designate. All the books of the said company and of the trustees relating to the lands hereby conveyed shall be mutually open to the inspection of said company and said trustees. It shall be the duty of said trustees to certify and deliver to the said party of the first part the said bonds as the same from time to time shall be demanded, issued, or used by the said party of the first part.

And it is hereby mutually agreed by and between the parties hereto that the said parties of the second part, and their survivor and successors, and their heirs, executors, and administrators, shall not be answerable for the acts, omissions, or defaults of each other nor for anything short of their own gross negligence or willful misfeasance.

It is hereby declared by the parties to this indenture that all the provisions of said acts of Congress, so far as they are applicable, are hereby made and shall be deemed and taken to be a part of this instrument; and the said provisions, in all that concerns the sale and disposal of the said lands hereby conveyed to the parties of the second part, are to be observed and strictly and faithfully carried out and fulfilled. And the said party of the first part covenants and agrees to and with the said parties of the second part that the said party of the first part shall and will at any and all times hereafter and from time to time execute, acknowledge, and deliver, under its corporate seal, to the said parties of the second part and their survivor or successors, all such other or further assurances, deeds, mortgages, obligations, transfers, indentures, and instruments in writing, and shall and will do and perform all such other or further acts or things as shall or may be necessary or proper, or as their counsel learned in the law shall deem necessary, proper, or expedient for the better or more effectually securing upon the above conveyed and mortgaged premises the payment of the said bonds so to be issued and the interest due and to grow due thereon in manner aforesaid, or for carrying into effect the true intent, design, objects, and purposes of these presents.

In witness whereof the said party of the first part has caused these presents to be signed with its corporate name and sealed with its

corporate seal, by its president and secretary, the day and year first above written.

[Central Pacific Railroad Company Seal.]

LELAND STANFORD,
President C. P. R. R. Co.
E. H. MILLER, JR.,
Secretary C. P. R. R. Co.

We accept the trust declared in the foregoing instrument.

CHARLES CROCKER. [SEAL.]
SILAS W. SANDERSON. [SEAL.]

Endorsed: Copy of the within answer received this 28th day of March, A. D. 1885. D. M. Delmas, attorney for plaintiff. Filed March 30, 1885. Jas. J. Flynn, clerk, by L. J. Welch, deputy clerk.

29 *Petition.*

In the Superior Court, City and County of San Francisco, State of California, Dep't —.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } No. 14511.

To the honorable the superior court in and for the city & county of San Francisco, State of California:

Your petitioner, the Central Pacific Railroad Company, respectfully shows—

That your petitioner is the sole defendant in the above-entitled action, now pending in this honorable court.

That said action was brought on or about the 28th day of March, 1885, the complaint therein having been duly filed on said date.

That the defendant has on this day and before the filing of this petition appeared in said action and filed an answer to the complaint of plaintiff.

That no term of this court has been held since this action, and this petition is filed before the term at which the cause could be first tried.

That no trial of said action has been had, and this petition is filed before the trial thereof.

That said action is a suit of a civil nature, at law, and arising under the Constitution and laws of the United States, and that the matter in dispute exceeds, exclusive of costs, the sum and value of five hundred dollars.

That said action is brought by the plaintiff to recover from the defendant on account of taxes claimed by the plaintiff to be due and payable from the defendant for State and county purposes, as will more fully appear by a reference to the plaintiff's complaint on file herein.

30 That the assessment described in the complaint and answer, and which the plaintiff in this action claims to be due and

payable, is an assessment which the State board of equalization of the State of California pretended to make under and by virtue of the authority conferred upon the board by section 10 of article XIII of the State constitution.

That the defendant claims in this action that said provisions of the constitution of the State of California, and the authority thereby conferred upon said State board of equalization, violate the provisions of the fourteenth amendment to the Constitution of the United States, in this, that its effect is to deprive the defendant of its property without due process of law, and that under it the defendant is denied any protection from the general laws of the State of California, which—

First. Require that property shall be taxed in proportion to its value.

Second. Require such proportions to be ascertained by a general law.

Third. Require, before the liability is fixed, that the right to be heard must be given.

Fourth. Which give an appeal from the assessor to another tribunal.

Fifth. Require the assessment to be made in the county, and prevent its being made in localities distant from the *situs* of the property.

Sixth. Prescribe the mode and manner of the assessment; and,

Seventh. Which allow deductions from indebtedness secured by mortgage.

Eighth. Which require property to be assessed at its actual value.

That in the assessment and apportionment described and mentioned in the answer the franchise of the defendant and the whole thereof is included in the valuation and so blended with the other assessments and valuations that it cannot be distinguished therefrom, and defendant claims in this action that under and by virtue of the acts of Congress of July 1st, 1862, and July 2d, 1864 (which acts are referred to in said answer), the defendant was, by the Government of the United States, selected as an instrument and means of that Government to carry into execution the said several acts of Congress; and defendant further claims in this action that, under and by virtue of said several acts of Congress, the State has no power to impose a tax upon the franchise or operations of defendant, and that such tax violates the provisions of said several acts of Congress.

That prior to the 1st day of January, 1881, the defendant was indebted to divers persons, citizens of the United States, and many of them then and now citizens and *bona fide* residents of the State of California, and others of them then and now citizens and *bona fide* residents of other States of the Union, in large sums for moneys advanced to construct and equip its railroad described in the answer herein; that to secure the payment of such indebtedness the defendant, long prior to the said day, executed and delivered a mortgage upon its railroad and all rolling stock and appurtenances, and upon a large number of tracts of land situated in different counties of the State of California, which said tracts of land then were and ever

since have been the property of defendant; that said indebtedness exceeded and still exceeds three thousand dollars per mile of said road; that no part thereof has ever been paid, except the accruing interest, and that the whole thereof is now and since the execution of said mortgage has been a valid and subsisting indebtedness against said company defendant, and has been and still is secured by said mortgage.

That the said pretended assessment made as aforesaid by said State board of equalization included the whole value of said property without any deduction therefrom; that under the constitution of the State of California, when property other than property such as is described in the complaint is assessed and valued for the purposes of taxation, it is the duty of the assessor making such valuation to deduct from the value of such property all indebtedness secured by mortgage or lien upon the property; that the supreme court of the State of California, the highest tribunal in said State, has decided that defendant (and others similarly situated) is not entitled to the protection of the fourteenth amendment of the Constitution
31 of the United States; is not a means or instrument of the Federal Government; that its franchise is assessable and subject to taxation without the consent of the Federal Government, and that defendant and others similiarly situated are not entitled to the reduction hereinbefore referred to; that said decision of the supreme court of the State of California is in full force and is binding upon the inferior courts of the State, and especially upon this court; that the facts stated in the answer herein are true, which answer defendant refers to and makes part of this petition; that defendant is the corporation mentioned in the said several acts of Congress hereinbefore referred to, and that the railroad of defendant which has been assessed by the State board of equalization is the road constructed, operated, and maintained by defendant under the said several acts of Congress; that the plaintiff in said action will rely upon the decision of the supreme court of the State of California, and that the construction of said several acts of Congress and of the fourteenth amendment to the Constitution of the United States is in this action disputed and must necessarily be adjudged and determined herein, and that if said adjudication and determination be in favor of defendant and against that heretofore made by the supreme court of the State of California such adjudication and determination will be conclusive in favor of defendant upon the merits of this action; that this is a suit arising under the Constitution and laws of the United States.

That your petitioner has made and filed with this petition a bond in the penal sum of five thousand dollars, with good and sufficient surety, conditioned that your petitioner shall enter in the circuit court of the United States to be held in the district of California, in the ninth circuit, on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and also shall appear in said circuit court and enter special bail in said suit, if special bail

was originally requisite therein, and shall do all such other and further appropriate acts as by the act of Congress approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," are requisite to be done upon removal of a suit in a circuit court of the United States from a State court, and your petitioner is ready and willing to give such other and further bonds and to do all such other acts as may be lawfully required.

Your petitioner therefore prays that this honorable court will accept this petition and said bond and proceed no further in said suit, and that said suit may be removed into the circuit court of the United States in and for the district of California, in the ninth circuit, as required by statute of the United States in such cases made and provided.

And your petitioner will ever pray, etc.

H. S. BROWN,
Attorney for Petitioner.

S. W. SANDERSON AND
CREED HAYMOND, *Of Counsel.*

Endorsed: Filed March 30, 1885. Jas. J. Flynn, clerk, by L. J. Welch, deputy.

32 *Bond on Removal.*

In the Superior Court, City and County of San Francisco, State of California, Dept. 7.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } No. 14511.

Know all men by these presents that we, The Central Pacific Railroad Company, as principal, and Charles F. Crocker and A. N. Towne, as sureties, are held and firmly bound unto The People of the State of California, pl'ff, in the sum of five thousand dollars, to be paid to the said plaintiff; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of March, 1885.

Whereas the above-entitled action was brought on or about the 28th day of February, 1885, in the superior court in the city & county of San Francisco, State of California, and the same is now pending in said superior court, by said The People of the State of California against said Central Pacific Railroad Company, and is removable into the circuit court of the United States in and for the district of California, in the ninth circuit, under and by that certain act of Congress of the United States, approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes;"

And whereas said The Central Pacific Railroad Company has made and is about to file herewith its petition in said suit in said superior court in and for the city & county of San Francisco, State of California, for the removal of said suit into said circuit court of the United States, to be held in the said district of California, in the ninth circuit:

Now, the condition of this obligation is such that if said The Central Pacific Railroad Company shall enter in such circuit
33 court of the United States on the first day of its next session a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also shall there appear and enter special bail in such suit if special bail was originally requisite therein, and shall do all such other appropriate acts as by the said act of Congress are required to be done upon the removal of a suit from a State court into the circuit court of the United States, then this obligation to be void; otherwise to remain in full force and virtue.

[C. P. R. R. Co. Seal.]

THE CENTRAL PACIFIC RAILROAD COMPANY,
By E. H. MILLER, JR., *Secretary.*
CHAS. F. CROCKER. [SEAL.]
A. N. TOWNE. [SEAL.]

STATE OF CALIFORNIA, *City and County of San Francisco,* } ss:

Charles F. Crocker and A. N. Towne, the sureties in the foregoing obligation, being each sworn, each for himself says that he is a resident of the State of California and a freeholder therein, and is worth the sum of five thousand dollars over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

CHAS. F. CROCKER.
A. N. TOWNE.

Subscribed and sworn to before me this twenty-seventh day of March, 1885.

[SEAL.] J. F. KINGWELL,
Notary Public in and for the City and County of San Francisco, State of California.

I hereby approve of the above sureties and accept and approve the foregoing bond.

Dated March 30th, 1885.

T. H. REARDEN,
Judge Superior Court, County of ——.

Endorsed: Filed March 30, 1885. Jas. J. Flynn, clerk, by L. J. Welch, deputy.

34 *Clerk's Certificate.*

I, Jas. J. Flynn, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court of said county, do hereby certify the foregoing to be a full, true, and correct copy of the whole of the record in the within action of The People of the State of California *vs.* The Central Pacific Railroad Company now on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of the said superior court this sixth day of April, 1885.

[SEAL.] JAS. J. FLYNN, *County Clerk*,
By R. H. FITZGERALD, *Deputy Clerk.*

35 Endorsed: In the circuit court of the United States, ninth judicial circuit. Transferred record. Filed April 7, 1885. L. S. B. Sawyer, clerk.

36 *Stipulation Waiving Jury and Submitting Cause.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } No. 3668.

It is hereby stipulated by and between the plaintiff and defendant in the above-entitled action that trial by jury is waived; and it is further stipulated that the above-entitled action shall be and is hereby submitted to the court for its findings and determination.

First. Upon the assessment roll on file in the office of the
37 comptroller of the State of California for the year 1884 and upon the assessment in the said roll contained and referred to in the complaint herein, which roll is hereby given in evidence.

Second. Upon the testimony heretofore given in this court by both parties upon the trial of the case of "The County of Sacramento *vs.* The Central Pacific Railroad, No. 3009," and the "County of Sacramento *vs.* The Central Pacific Railroad Company, No. 3099," and "The People of the State of California *vs.* The Central Pacific Railroad Company, No. 2845," which cases were determined by this court in the year 1883.

Third. Upon the admission of the facts stated in paragraph No. 2 of the defendant's answer, except that plaintiff does not admit that defendant is a Federal agency or a corporation existing under the laws of the United States.

38 Fourth. Upon the admission made by the plaintiff that the facts stated in the third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, seventeenth, eighteenth, and nineteenth paragraphs of defendant's answer are true.

Fifth. Upon the admission of the plaintiff that the facts stated in paragraph 22 of said answer are true, with this exception, that

the defendant does not admit that the facts stated constitute any discrimination against the corporations or any of them mentioned in said paragraph.

Sixth. Upon the admission by plaintiff that facts stated in paragraphs 23 and 24 of said answer are true, except that plaintiff does not admit that by virtue of section 10 of article 13 of the con-
39 stitution of the State or any law of the State owners of railroad property operated in more than one county in the State are denied any protection from the laws of the State of California.

Seventh. By testimony offered by the defendant tending to prove the averments contained in subdivisions 25 and 25*a* of said answer, and by testimony offered by plaintiff tending to disprove the averments in said paragraphs contained.

Eighth. By the admission of plaintiff that the averments contained in paragraphs 29, 30, 32, and 34 are true.

Ninth. Upon the admission of the plaintiff that the tender pleaded in said answer has been kept good, and that under the order of this court made on the — day of September, 1885, defendant has
40 paid to the plaintiff on account of said tender and without prejudice to either party the sum of $169,685.00 for uses and purposes specified in defendant's answer relating to said tender.

Tenth. That the averments contained in the 35th and 36th paragraph- of defendant's answer are true.

It is hereby stipulated that the court in making its findings in this case may, in considering the testimony given in the cases referred to in this stipulation, and in considering the matters mentioned in the stipulation hereinbefore referred to in relation to the time and place and all other things, adapt the same to the issues in this case and consider all such matters as if such changes had been made before submission.

41 E. C. MARSHALL,
Att'y Gen'l, Attorney for Plaintiff.
H. S. BROWN,
Attorney for Defendant.

Endorsed: Filed Sept. 17, 1885. L. S. B. Sawyer, clerk.

42 *Findings.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } No. 3668.

The above-entitled cause having on the 25th day of July, 1885, been brought on to a hearing before the court without a jury, the said parties, by stipulation in writing filed with the clerk, having waived a jury, and the evidence introduced by the respective parties

having been fully considered, the court finds the facts in issue in said action as follows:

43 I.

That the defendant was not on the 16th day of August, 1884, or at any other time indebted to plaintiff in the sum set out in the complaint or any other sum or any account; that on the 16th day of August, in the year 1884, said State board of equalization assessed the property of defendant hereinafter referred to and in form as hereinafter set out at the sum of twenty-four million of dollars and apportioned said assessment, as alleged in plaintiff's complaint.

44 II.

Defendant a Corporation—Its Place of Business—Line of Road—Stockholders.

The defendant is a corporation existing under the laws of the United States and of the State of California (as will hereafter more fully appear), and as such has been for many years past and still is (except in the respect hereinafter stated) the owner of a line of railroad, known as the Central Pacific railroad, extending from the Pacific Ocean across the State of California and the State of Nevada to Ogden, in the Territory of Utah. The principal place of business of defendant now is and for many years last past has been in the city of San Francisco, State of California. Some of its stockholders and members now are and ever have been citizens of the United States resident in said State of California, and some of its stockholders and members now are and ever have been citizens of the United States resident in States other than the State of California.

III.

Length of Road in the Several Counties.

The total length of said railroad in said State of California is 602.22 miles, and the length thereof in the respective counties through which it passes is as follows: In the county of San Francisco, 4 miles; in the county of Alameda, 83.52 miles; in the county of Santa Clara, 8.50 miles; in the county of San Joaquin, 56.75 miles; in the county of Sacramento, 41 miles; in the county of Placer, 112.75 miles; in the county of Nevada, 30.25 miles; in the county of Sierra, 2.15 miles; in the county of Yuba, 15.87 miles; in the county of Sutter, 10 miles; in the county of Butte, 45 miles; in the county of Tehama, 40.24 miles; in the county of Shasta, 18.80 miles; in the county of Stanislaus, 22.63 miles; in the county of Merced, 36.75 miles; in the county of Fresno, 61.06 miles, and in the county of Tulare, 12.65 miles. The length of said road from the city of Sacramento through the counties of Sacramento, Placer, Nevada, and Sierra to the eastern boundary of said State is 186.25 miles.

IV.

Purpose of the Formation of the C. P. R. R. Co. of California.

On the 28th day of June, 1861, a corporation was formed and organized under the laws of the State of California under the corporate name of the Central Pacific Railroad Company of California. Said corporation was formed for the purpose of constructing, owning, and operating a line of railroad and telegraph, commencing at the city of Sacramento, in said State, and running thence through the counties of Sacramento, Placer, Sierra, and Nevada to the eastern boundary of said State, in the expectation that its proposed railroad would, when constructed, constitute part of a line of railroad extending from the Missouri river to the Pacific Ocean, which line was then supposed was about to be constructed under the legislative supervision and authority of the Government of the United States and which line of railroad was afterwards so constructed.

V.

Act of Congress of July 1st, 1862—Pacific Railroad Act.

On or about the 1st day of July, 1862, the Government of the United States undertook to construct or to cause to be constructed a line of railroad from the Missouri river to the Pacific Ocean, and to that end Congress passed an act entitled "An act to aid in the construction of a railroad from the Missouri river to the Pacific Ocean and to secure to the Government the use of the same for postal, military, and other purposes."

By said act certain persons therein named were made and erected into a corporation under the name and style of the "Union Pacific Railroad Company," and said corporation was authorized and empowered to construct, own, and operate a line of railroad and telegraph from the Missouri river to the Pacific Ocean.

45

VI.

Act of Congress of July 2d, 1864—Amendment.

On or about the 2d day of July, 1864, Congress passed an act entitled "An act to amend an act entitled An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the Government of the United States the use of the same for postal, military, and other purposes, approved July 1, 1862."

VII.

Intent of Congress in Passing Acts of 1861 and 1864.

The intent and purposes of Congress in passing said acts was to secure the completion of a railroad from the Missouri river to the Pacific Ocean and to secure the use thereof for all time to come to the Government of the United States for the transportation of its mails, troops, munitions of war, and public stores.

VIII.

C. P. R. R. Co. Accepts Terms Offered by Congress.

Said Central Pacific Railroad Company of California filed in the Department of the Interior its acceptance of the terms and conditions of said act of Congress of July 1st, 1861, within the time therein designated.

IX.

Transfer of Rights to W. P. R. R. Co.

On or about the 31st day of October, 1864, said Central Pacific Railroad Company of California sold and assigned all its rights under the aforesaid acts to a corporation then existing under the laws of the State of California and known as the Western Pacific Railroad Company, so far as said rights related to the construction of said railroad and telegraph between the cities of San Jose and Sacramento, in said State of California. Said assignment was ratified and confirmed by the United States by an act of Congress passed on the 3d day of March, 1865, entitled "An act to amend an act entitled An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the Government the use of the same for postal, military, and other purposes, approved July 1st, 1862, and to amend an act amendatory thereof, approved July 2d, 1864."

X.

Railroad Completed.

The said line of railroad from the Pacific Ocean to Ogden, in Utah Territory, was completed and put in operation in 1869, and has been in operation from that time until the present, and still is in operation, and the whole of the railroad mentioned in the said acts of Congress *have* long since been completed and is now, in accordance with the spirit and intent of said acts of Congress, operated as one continuous line from the Missouri river to the Pacific Ocean, and is so operated and maintained for the uses and purposes mentioned in said acts.

46 XI.

Consolidation.

In August, 1870, acting under the said acts of Congress, said Central Pacific Railroad Company of California and the said Western Pacific Railroad Company formed themselves into one corporation under the name of the Central Pacific Railroad Company. Said company is the defendant herein, and has from the completion of said railroad as aforesaid until the present time owned (except in the respect hereinafter stated) and operated said railroad under and by virtue of said acts of Congress and for the uses and purposes therein mentioned.

XII.

Indebtedness Secured by Mortgage.

The bonds loaned by the United States under said acts of Congress of July 1st, 1862, and July 2d, 1864, to said Central Pacific Railroad Company of California were about twenty-seven millions of dollars. No part of said loan, except the accruing interest thereon, has been paid, but the same now is and for more than five years last past has been outstanding. To secure the payment of the same the United States now have and ever since the issue of said bonds have had a lien by mortgage upon the said railroad, its rolling stock, fixtures, and franchises. By said act of Congress of July 2d, 1864, said Central Pacific Railroad Company of California was authorized to issue its bonds in an amount equal to said United States bonds, and to secure the payment of the same by a mortgage upon its said road, telegraph, franchises, and properties. Under the provisions of said act said bonds, to the amount of more than five thousand dollars per mile, were issued before the first day of January, 1875, and the payment of the same was secured by a mortgage made by said company upon its said railroad, rolling stock, and franchises. Said bonds are unpaid and outstanding, but are not yet due, and the same now are and ever since their issue have been secured by the mortgage aforesaid. Many of said bonds now are and ever have been owned by citizens and *bona fide* residents of the State of California, while other of said bonds now are and ever have been owned by citizens of the United States *bona fide* residents of States other than California.

XIII.

Land Mortgage.

To further aid in the construction of its railroad hereinbefore described the defendant on the first day of October, A. D. 1870, made, executed, and delivered a mortgage covering all its said lands acquired under the acts of Congress aforesaid in the sum of ten million of dollars. Said mortgage was duly acknowledged and filed for record in the office of the county recorder of the several counties in which said land is situated, a copy of which is annexed to defendant's answers, marked "Exhibit A," and made a part thereof. To secure the payment of said mortgage the defendant issued bonds in the amount of ten million of dollars. A part of said bonds have been redeemed, but there still remains due and unpaid $5,749,000, which is a valid and subsisting lien upon all of said lands. Said unpaid bonds now are and ever have been owned and held by citizens and *bona fide* residents of the State of California, and some of said bonds now are and ever have been owned by citizens of the United States *bona fide* residents of States other than the State of California.

The lands covered by said land mortgage are situate in the States of California and Nevada and the Territory of Utah. The aggre-

gate amount of said lands in the State of California is 652,125 acres. Said lands are situated in the following counties in the quantity herein set out, as follows: In Sacramento county, 217 acres; in Placer county, 19,930 acres; in Nevada county, 23,681 acres; in Sierra county, 9,667 acres; in Yuba county, 27,838 acres; in Sutter county, 2,878 acres; in Butte county, 128,500 acres; in Tehama county, 119,692 acres; in Shasta county, 82,844 acres; in Colusa county, 280 acres; in El Dorado county, 35,036 acres; in Plumas county, 7,163 acres; in Yolo county, $\frac{26}{100}$ acres.

47 XIV.

Mortgaged Lands—Mode and Manner of Assessment—Payment of Taxes.

The lands mentioned in the preceding subdivision are not, and never have been, in any way connected with the railroad business of the defendant. They are agricultural and grazing lands, held, owned, and used for farming and grazing purposes.

Said lands and all of them for each of the years 1880, 1881, 1882, 1883, & 1884 were assessed by the assessors of the respective counties in which they are situated at their full cash value, and no deduction from said value was made or allowed on account of said mortgage or the indebtedness secured thereby; on the contrary, the laws of the State of California under which said assessors acted in making said assessments prohibited any deduction from said values on account either of the mortgages or the indebtedness secured thereby.

In each of said years the defendant paid in full, at the time the same became payable, all the taxes levied upon said lands, amounting in the aggregate for State, county, and municipal purposes to over $130,000.

The laws of the State of California, then and ever since in force, provide that in the assessment and valuation of lands of like character and situation, and in every respect similar both in quality and use, not owned by railroad or other quasi-public corporations, a mortgage thereon by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, and that in the assessment and valuation of such property for the purposes of taxation the value of said mortgages shall be deducted therefrom and the owner of said lands or property only assessed and taxed for the value in excess of the value of the mortgage.

To assist the assessor in the performance of his duties and to enable him to make the deductions aforesaid the laws of the State of California make it the duty of the recorder of each county annually, on or before the first Monday in April, to transmit to the assessor a complete abstract of all mortgages by which any debt is secured remaining unsatisfied on the records of his office at 12 o'clock meridian on the first Monday of March of said year; and it is further provided by said laws that should any such list be found to contain any instrument relating to lands situated in more than one county it shall be the duty of the assessor to transmit to the State board of

equalization all information relating thereto, and it shall be the duty of the State board to attach an apportionment of valuation of such instrument to be assessed in each county and to transmit to the assessor of each county mentioned as affected in said instrument a statement of valuation of assessment to be levied against said instrument in such county.

In the matter of the valuation of its said lands for the purposes of taxation the defendant is and ever has been deprived of all the benefits of the said laws which provide for the deduction of indebtedness secured by mortgage from the valuation of lands by reason of the provisions of section 4 of article XIII of the constitution of the State of California and the action of the assessors in pursuance thereof, while all natural persons and all corporations not *quasi* public within the State of California are entitled to receive and do receive the full benefit of said laws and the deductions required to be made thereunder.

XV.

Assessment by State Board of Equalization.

On the 16th day of August, 1884, the State board of equalization of the State of California, acting under and by virtue of the powers conferred upon it by section 10 of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, and rolling stock and property of said railroad against defendant. Said pretended assessment was not made separately upon the franchise, roadway, road-bed, rails, and rolling stock, or any properties of said railroad, but all of said properties were blended together in making said assessment, which assessment was then and there so entered upon the minutes of said board. Said assessment is the assessment upon
48 which the several taxes mentioned in the complaint herein are based; and no other assessment than the aforesaid was ever made of said property or any part thereof for said fiscal year; said assessment included all property and kinds of property mentioned in section 3665 of the Political Code of California as amended March 9, 1883, except depots, stations, shops, and buildings erected upon the space covered by the right of way, which last-mentioned property was assessed as provided in said section by local assessors

XVI.

State Board Pretended to Assess the Whole of said Property to Defendant.

The State board of equalization, in making the said pretended assessment, pretended to assess to and against defendant the full cash value of said railroad, roadway, road-bed, rails, rolling stock, and franchises and property, as prescribed in said section 3665, without deducting therefrom the value of the mortgage or any part thereof

given and existing thereon as aforesaid to secure the indebtedness of said company to the holders of said bonds, notwithstanding they had full knowledge of the existence of such mortgage.

XVII.

State Board Did Not Treat said Mortgage as an Interest in the Property.

In making said pretended assessment the said State board of equalization did not deem or treat said mortgages as an interest in said property, but did assess the whole value of said property to the defendant in the same manner it would have done had there been no mortgages thereon.

49 XVIII.

Authority Exercised by State Board Violates Provisions of Fourteenth Amendment.

Under the constitution of the State of California the board of supervisors of the several counties of the State constitute boards of equalization for their respective counties, whose duty it is to equalize the valuation of the taxable property in the county, except the franchise, roadway, road-bed, rails, and rolling stock of railroads operated in more than one county of the State, and to such boards the owners of all property, except as above stated, have the right and privilege to apply for the correction of their assessments, and have the right and privilege of a hearing before the said local boards of equalization. By the provisions of the constitution of California and the laws in pursuance thereof this right and privilege or any right or privilege to be heard in relation to assessments is denied to defendant in respect to the property in question.

XIX.

Further Discrimination.

The provisions of section four of the constitution of the State of California, providing for the assessment of the property of railroad and other quasi-public corporations, is in contravention of the provisions of said Fourteenth Amendment of the Constitution of the United States, in that it discriminates against such corporations; in this, that whereas under said section four of said article XIII of the constitution of the State of California if the property of natural persons or corporations not *quasi* public has a mortgage, lien, or incumbrance thereon they are not liable to assessment or taxation upon such property, but only upon the value of their interest in such property over and above the value of such mortgage, lien, or incumbrance, whereas in the case of the property of railroad and other quasi-public corporations no such allowance or deduction is made, had, or allowed with respect to any mortgage, lien, or incumbrance there may be upon such property, and also in this, that while the

tenth section of article XIII of the constitution of the State of California provides the same mode for the assessment of the franchises, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county, whether such property be owned by railroad or other quasi-public corporations, or by private corporations, or by natural persons, yet section four of article XIII of said constitution permits or allows indebtedness secured by mortgage, trust deed, or otherwise to be deducted from the value of such property only when it is owned by natural persons or corporations not *quasi* public, and denies such deduction when the property is owned by railroad or other quasi-public corporations.

XX.

Section 10 of article XIII of said constitution of California provides that all property except the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in the State shall be assessed in the county, city, city and county, town, township, or district in which it is situated in the manner prescribed by law.

The laws of said State prescribe that all property, except that above mentioned, shall be assessed in the county in which it is situated by an assessor elected by the people of such county.

The assessors of the several counties in the State of California have, in each year since the adoption of said constitution, assessed all moneys, credits, bonds and stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership situated in their said counties, and all dues and credits held, owned, or in the possession of persons resident in said county, to such persons.

Said assessors for each of said years have assessed to the owners and holders thereof in their respective counties the indebtedness of the defendant secured by the mortgage herein mentioned, but never have, nor does the law permit them so to do, made any deduction from the assessment of any of the property of this defendant on account of the assessments made as aforesaid to the holders of such indebtedness.

XXI.

Further Discrimination.

At and before and ever since the adoption of the constitution of California now in force there were and are existing under the laws of said State corporations of various kinds formed for the purpose of and actually operating and doing business and holding and using and operating property in more than one county in said State, and at all of said times there were and there now are divers natural persons residents of said State operating property in more than one county in said State, and at all of said times there were and now are railroads owned by corporations formed under the general laws of said State, and also by natural persons, which are only operated in one county. By the provisions of section ten of article XIII of said State

constitution persons operating railroads in more than one county in the State have been singled out from all other persons operating property in more than one county and denied the right, common to all other persons, to appeal for relief from overvaluations of their property by assessors to the local board of equalization and denied the rights and privileges accorded by the laws to all other persons in that respect.

Corporations in said State of California now are and ever have been formed under general laws relating thereto, and railroad and all other corporations, except public corporations formed or organized for the government of a portion of the State, now are and ever have been designated by the laws of California as private corporations. Under the provisions of the laws relating to the formation of private corporations such corporations may be formed for any purpose for which individuals or natural persons may lawfully associate themselves together; and there now exist in California,
51 and ever have existed, corporations formed under said laws for fire, marine, mutual life, health, and accident insurance; building, constructing, and operating railroads, wagon roads, telegraphs, bridges, ferries, wharves, chutes, and piers, and for constructing and operating canals; for the purposes of acquiring lands in large tracts and distributing them as homesteads among the corporators; for savings and loans; for mining; for the sale and distribution of water in cities and towns; for manufacturing, mechanical, and agricultural purposes; for benevolent, charitable, and educational purposes; for cemeteries, agricultural fairs, and various other purposes.

In said State of California there now are and for more than three years last past have been various railroads owned, operated, and controlled either by individuals, partnerships, or by private corporations other than railroad corporations, to wit, by mining and manufacturing corporations. There now is and for more than three years last past has been a railroad in use and operation extending from the city of Marysville, in the county of Yuba, to the town of Oroville, in the county of Butte, in said State, a distance of twenty-seven miles, which said road now is and ever has been operated in more than one county in this State, and is of the same gauge as the road of defendant and has ever been operated for like uses and purposes.

Said road, with all its equipments, now is and for more than three years last past has been in the ownership and under the operation and control of one N. D. Rideout, a citizen of the United States and resident of the State of California.

There now is and for more than three years last past has been a railroad extending from the town of Santa Cruz, on the Pacific Ocean and in the county of Santa Cruz, eastward through said county and into the county of Monterey, to the town of Pajaro, a distance of about twenty-one miles. Said road now is and for a long time past has been owned, operated, and used for like purposes for which the defendant's road is owned, operated, and used, and that the same now is and for a long time past has been in the ownership and operated by the Pacific Improvement Company, a

private corporation formed under the laws of the State of California, which said corporation is not and never has been a railroad or quasi-public corporation.

There now are and for more than five years last past have been divers other railroads owned and operated in said State by corporations other than railroad corporations and by individuals and partnerships, and that all of said corporations, individuals, and partnerships are the owners of lands which are assessed by the local assessors of the various counties in which such lands are situated, and all are entitled under the laws of said State to the deductions provided for in said laws and have been allowed such deductions.

XXII.

Rules of Equality as Regards the System Adopted by said Board.

The State board of equalization, in making the supposed assessment of said roadway of defendant, did knowingly and designedly include in the valuation of said roadway the value of fences erected upon the line between said roadway and the land of cotermin-us proprietors.

52 XXIII.

Whole Franchise Assessed.

Said pretended assessment made by the State board of equalization is upon all of the franchises of defendant, and the said board in valuing the same included the value of all the franchises and corporate powers held and exercised by defendant.

53 XXIV.

Tax upon the Franchise Blended with Tax upon Other Property.

The State board of equalization in making said pretended assessment included and assessed the franchise of defendant, and in making said pretended apportionment included in the valuation affixed to the property of defendant the value thereof, but such value is not separately stated in said apportionment, nor upon any assessment roll or delinquent list of said county, but such value is in said pretended apportionment and upon the assessment roll and delinquent list of said county blended with the values affixed to the roadway, road-bed, etc., and cannot on either be distinguished or separated from such other values, and the tax upon said franchise is in like manner blended with and cannot be separated from the tax on said roadway, road-bed, etc.

XXV.

Sole Authority upon Which Tax is Based.

Said pretended assessment is the only assessment of said property, and the pretended tax for non-payment of which this action is brought is founded upon said pretended assessment and upon no other assessment.

XXVI.

Plaintiff's Causes of Action Based upon Assessment by State Board of Equalization.

On the 16th day of August, 1884, the State board of equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section ten of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, rolling stock, and property of the railroad hereinbefore described and known as the Central Pacific Railroad against this defendant; that said pretended assessment was not made separately upon the franchise, roadway, road-bed, rails, and rolling stock, and property of said railroad, but all of said properties were blended together in making said assessment, which assessment was then and there
54 so entered upon the minutes of said board. Said pretended assessment is the assessment upon which the several taxes mentioned in plaintiff's complaint are claimed to be due, and that no other assessment than such pretended assessment was ever made against or upon said property or any part thereof.

XXVII.

No Rules or Regulations.

Said State board of equalization has never at any time made or adopted any rule or regulation relative to the assessment or valuation of railway property of any kind, nor has it ever made or adopted any rule to govern or regulate its proceedings in the exercise of the powers conferred upon it by section 10 of article XIII of the constitution of California.

XXVIII.

Tender.

On the twenty-seventh day of December (November), 1884, the defendant, while then denying all liability upon said pretended assessment and claiming that all of the proceedings had in relation thereto were in violation of law and the rights of defendant, tendered and offered the said plaintiff the sum of $169,685.00 in United States gold coin in part payment of the tax claimed, with an agreement that the receipt of said sum should not prejudice the plaintiff in any legal rights; and defendant brought said sum into court and offered the same to plaintiff, and, if refused by plaintiff, subjected the said sum to such orders or judgments as the court might make
55 in the premises; and defendant tendered specifically for the benefit of the State and on the amount claimed by the State the sum of $52,833.60, and on account of the various county taxes claimed it tendered sums as follows, to wit: For the county of Alameda the sum of $9,691.44; for the county of Butte the sum of

$8,743.98; for the county of Fresno the sum of $10,117.38; for the county of Merced the sum of $6,089.31; for the county of Nevada the sum of $11,514.10; for the county of Placer the sum of $19,783.75; for the county of Sacramento the sum of $4,717.45; for the county of San Francisco the sum of $879.28; for the county of San Joaquin the sum of $4,363.57; for the county of Santa Clara the sum of $1,170.65; for the county of Shasta the sum of $15,106.85; for the county of Sierra the sum of $860.37; for the county of Stanislaus the sum of $2,644.24; for the county of Sutter the sum of $1,070.77; for the county of Tehama the sum of $13,795.97; for the county of Tulare the sum of $2,343.23; for the county of Yuba the sum of $3,959.06.

56 That said tender has been kept good, and that defendant on the 16th day of September, 1885, pursuant to an order of this court, paid to the attorney general for the use and purposes mentioned in said tender the said sum of $169,685.00.

Conclusions of Law.

From the foregoing facts the court finds as a conclusion of law that the defendant is entitled to judgment in its favor with costs.

Sept. 25, 1885.

(Signed) LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed September 25th, 1885. L. S. B. Sawyer, clerk

57 *Judgment.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

PEOPLE OF THE STATE OF CALIFORNIA
vs.
CENTRAL PACIFIC RAILROAD COMPANY. } No. 3668.

This action came on regularly for trial by the court, a jury trial hereof having been waived by written stipulation of the parties hereto, and the evidence of the respective parties being adduced and the arguments of counsel had thereto, the cause was submitted to the court for consideration and decision; and the court, after due deliberation, having filed its findings in writing and ordered that the judgment be entered herein for the defendant in accordance therewith:

58 Now, therefore, by virtue of the law and the finding aforesaid, it is considered by the court that the plaintiff take nothing by this action; that the defendant go hereof without day, and that said defendant recover from said plaintiff its costs in this behalf expended, taxed at $——.

Entered this 25th day of September, 1885.

L. S. B. SAWYER, *Clerk.*

A true copy.
Attest, &c.: [SEAL.] L. S. B. SAWYER, *Clerk.*

(Endorsed:) Filed September 25th, 1885. L. S. B. Sawyer, clerk.

59 *Clerk's Certificate.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

PEOPLE OF THE STATE OF CALIFORNIA
vs.
CENTRAL PACIFIC RAILROAD COMPANY. } No. 3668.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the therein-entitled action.

Witness my hand and the seal of said circuit court this 25th day of September, A. D. 1885.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON, *Deputy Clerk.*

60 Endorsed: Judgment roll. Filed Sept. 25, 1885. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

61 *Bond on Writ of Error.*

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant in Error.

Know all men by these presents that we, Wm. McPherson Hill and W. J. Tinnin, are held and firmly bound unto the Central Pacific Railroad Company in the sum of five hundred dollars, lawful money of the United States of America, to be paid to said The Central Pacific Railroad Company, its successors or assigns; to the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated the 26th day of September, 1887.

62 Whereas the above-named the People of the State of California have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered and entered by the circuit court of the United States of America for the district of California in the cause entitled The People of the State of California *vs.* The Central Pacific Railroad Company, No. 3668:

Now, therefore, the condition of this obligation is such that if the

above-named The People of the State of California, plaintiff in error, shall prosecute their said writ of error to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

W. McPHERSON HILL.
W. J. TINNIN.

Signed, sealed, and delivered in the presence of—
F. D. MONCTON.

63 UNITED STATES OF AMERICA, } ss:
District of California, }

Wm. McPherson Hill and W. J. Tinnin, being duly sworn, each for himself deposes and says that he is a householder and is worth the sum of five hundred dollars in lawful money of the United States of America, exclusive of property exempt from execution and over and above all debts and liabilities.

W. McPHERSON HILL.
W. J. TINNIN.

Subscribed and sworn to before me this 26th day of September, 1886.

F. D. MONCTON,
Commissioner U. S. Circuit Court,
Northern District of California.

Endorsed: The form of the within bond and the sufficiency of the sureties are hereby approved Sept. 26, 1887. (Signed) Lorenzo Sawyer, judge. Filed Sept. 26th, 1887. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

64 In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Northern District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } No. 3668.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, do hereby certify that the foregoing sixty-three written and printed pages, numbered from 1 to 63, inclusive, are a full, true, and correct copy of the record and of all proceedings in the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error.

And I further certify that on page 9 of the original find-
65 ings filed in the above-entitled cause subdivision XXII appears on a printed slip attached to the margin of said page 9, and on page 12 of said findings subdivision XXVIII, containing printed and written matter, is pasted, and that said copy of the

record contains the transcription of said slip and said pasted printed and written matter.

Witness my hand and the seal of said circuit court this 30th day of September, A. D. 1887.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER, *Clerk.*

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of the ninth judicial circuit in and for the northern district of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between The People of the State of California, plaintiffs in error, and The Central Pacific Railroad Company, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by *his* complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be- inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26th day of September, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER,
Clerk of the Circuit Court of the United States
Northern District of California.

The above writ of error is hereby allowed.

LORENZO SAWYER,
U. S. Circuit Judge, 9th Judicial Circuit.

67 UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 26th day of Sept., 1887, and personally served the same, on the 26th day of Sept., 1887, on the Central Pacific Railroad Company by delivering to Creed Haymond, Esq., attorney for said defendant named therein,

personally, at the city & county of San Francisco, in said district, a certified copy thereof.

San Francisco, September 29th, 1887.

J. C. FRANKS,
U. S. Marshal,
By L. B. HOPKINS, *Deputy.*

The Answer of the Judges of the Circuit Court of the United States for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER, *Clerk.*

[Endorsed:] No. 3668. United States Supreme Court. The People of the State of California, pl'ffs in error, *vs.* The Central Pacific Railroad Company, def't in error. Writ or error. Service of a copy of the within writ of error is hereby acknowledged. Creed Haymond, att'y for def't in error. Filed Sept. 29, 1887. L. S. B. Sawyer, clerk.

68 UNITED STATES OF AMERICA, *ss:*

To the Central Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the 10th day of October, A. D. 1887, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of California, wherein The People of the State of California are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States of the ninth judicial circuit for the northern district of California, this 26th day of September, A. D. 1887, and of the Independence of the United States the one hundred and twelfth.

LORENZO SAWYER,
U. S. Circuit Judge, 9th Judicial Circuit.

69 UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 26th day of Sept., 1887, and personally served the same, on the 26th day of Sept., 1887, on the Central Pacific Railroad Company by delivering to Creed Haymond, Esq., attorney for said defendant named therein,

personally, at the city & county of San Francisco, in said district, a certified copy thereof.

San Francisco, September 29th, 1887.

J. C. FRANKS,
U. S. Marshal,
By L. B. HOPKINS, *Deputy.*

[Endorsed:] No. 3668. In the Supreme Court of the United States. The People of the State of California, pl'ffs in error, *vs.* The Central Pacific Railroad Company, def't in error. Citation. Service of a copy of the within citation is hereby acknowledged. Creed Haymond, att'y for the defendant & defendant in error. Filed Sept. 29, 1887. L. S. B. Sawyer, clerk.

Endorsed on cover: N. California C. C. U. S. No. 1157. The People of the State of California, plaintiffs in error, *vs.* The Central Pacific Railroad Company. Filed October 10, 1887.

Office Supreme Court U. S.
FILED
JAN. 3 1888
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1887.

No. 660.

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

No. 661.

SAME

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY.

No. 662.

SAME

vs.

THE NORTHERN RAILWAY COMPANY.

No. 663.

SAME

vs.

THE CALIFORNIA PACIFIC RAILROAD COMPANY.

No. 664.

SAME

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

No. 1,157.

SAME

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

BRIEF FOR PLAINTIFF IN ERROR,

By SHELLABARGER & WILSON.

Press of Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term, 1887.

THE PEOPLE OF THE STATE OF CALIFORNIA *vs.* THE CENTRAL PACIFIC RAILROAD COMPANY.	No. 660.
SAME *vs.* THE SOUTHERN PACIFIC RAILROAD COMPANY.	No. 661.
SAME *vs.* THE NORTHERN RAILWAY COMPANY.	No. 662.
SAME *vs.* THE CALIFORNIA PACIFIC RAILROAD COMPANY.	No. 663.
SAME *vs.* THE CENTRAL PACIFIC RAILROAD COMPANY.	No. 664.
SAME *vs.* THE CENTRAL PACIFIC RAILROAD COMPANY.	No. 1,157.

The foregoing cases are alike as to their facts, except as to the amounts of the several assessments involved. They are also alike as to the legal questions involved.

We therefore make the statement of the case below as applicable to each case, and the assignment of errors here-

inafter set forth as applicable to each, and beg that they may be so considered, to avoid unnecessary repetition.

At the end of this brief will be found a special statement as to cases 660, 661, 662, 663 and 1,157, with reference to the question whether fences and steamers were included in the assessments which are in controversy in those cases.

In this brief attention will be especially directed to case No. 664, THE PEOPLE, &c., *v.* THE CENTRAL PACIFIC RAILROAD COMPANY, and for the reason that, in that case, the items of "fencing" (Rec., p. 35), and "steamers" (Rec., p. 41), are not embraced in the assessment, and, by reason of which, the said case, No. 664, presents unembarassed the constitutional questions which it is so important to the State of California to have decided, and which will hereinafter be specifically stated and considered.

Statement of Case.

1st. The plaintiff in error sued the defendant in error in the Superior Court of the city and county of San Francisco, California, for State and county taxes, on an assessment made by the State Board of Equalization, on the franchise, road-bed, roadway, rails and rolling-stock of the defendant. The amount of this assessment was twenty-two millions of dollars ($22,000,000). (Rec. p. 1.)

2d. On the application of the defendant in error, the case was transferred to the Circuit Court of the United States for the District of California. (Rec., p. 30.)

3d. The defendant answered, denying the indebtedness, in this:

That it was a railroad company, organized under the laws of the State of California; and, that afterwards, by certain statutes of the United States, was incorporated into and became a part of a system of railroads extending from the Missouri river to the Pacific Ocean, and an instrumentality used by the United States for the purpose

of transferring mails, troops, munitions of war, etc., and received from the United States aid in the construction of its road, in bonds and grants of lands.

That the company issued bonds to procure money for the purpose of constructing the road, and secured the same by a mortgage on the property assessed; and that the United States also holds a mortgage on said property for the purpose of securing the bonds granted by the United States; which said mortgages were subsisting at the time of said assessment.

That by the Constitution and laws of California it is provided that in case of individuals and of corporations other than railroad corporations operating a road in more than one county in the State, and other *quasi*-public corporations, in assessing property for taxation, the amount of encumbrances upon such property is to be deducted from the value, and the owner of the property only taxed for the excess of the value over such encumbrances, and the owner of the encumbrance is taxed for the amount of such encumbrance; while in respect to railroad corporations operating in more than one county in the State, such deductions are not permitted.

That in making the assessment in question the State Board of Equalization did not deduct from the value of the said franchise, road-bed, roadway, rails, and rolling stock, the amount of said mortgages, but assessed the entire value of the said property to the defendant in error, regardless of such mortgages, and blended the franchise with the road-bed, roadway, rails, and rolling stock in making the assessment.

That by the Constitution of the State of California, in case of the assessment of property in counties, other than such railroads as are above mentioned, the Board of Supervisors of the counties constitute County Boards of Equalization, to which owners of property may apply for correction of their assessments, and have the right and privilege to

appear before such Boards of Equalization in respect to such correction.

That by the provisions of the Constitution of the State this right to be heard is denied to railroad corporations operating roads in more than one county, such as defendant. And that the State Constitution does not provide for personal or other notice to be given to the parties to be affected by exercise of the power conferred upon the State Board of Equalization, in regard to the assessment of the property of such corporations as the defendant.

(It is further set up in the answer, that the company received a grant of lands to aid in the construction of the road, covering which it executed a mortgage to secure the payment of certain bonds known as "Land-grant Bonds and Mortgage," but these lands are not embraced in the assessment on which this suit is brought, and, therefore, this feature of the answer is of no importance in this case, except in so far as the method of assessing and taxing such lands may show a difference between the mode of assessing and taxing property such as is involved in this case, and the mode of assessing and taxing such property as is covered by this land-grant mortgage.)

This answer further avers, in connection with the matters hereinbefore referred to, that since the Constitution and laws of California provide for deducting, from the value of property assessed against individuals and corporations other than railroads operating in more than one county of the State, and other *quasi*-public corporations, the amount of encumbrances on the property assessed; and, since, as to railroad corporations operating in more than one county in the State, and other *quasi*-public corporations, such deductions are not permitted, this is a violation of the clause of the fourteenth article of amendment of the Constitution of the United States securing equal protection; and, therefore, the assessment in question is void.

And it further avers and claims that since, by the Constitution and laws of California, no provision is made for notice to the corporation that the assessment has been made, and no opportunity given to the corporation to have a hearing before the Board of Equalization, in respect to the making of such assessment, and the collection of such tax, this is a deprivation of property without due process of law, and a violation of the provision of the fourteenth amendment in that regard. The case was submitted to the Court upon a stipulation (Rec., p. 35), and the Court, in substance, found that the State Board of Equalization did make the assessment and apportionment, as set forth in the complaint; that the corporation was organized under the laws of the State of California, and that it received from the United States a grant of lands and bonds, and, in consideration of this grant, became subject to the duty to carry the mails, troops, and munitions of war of the United States, &c.; that in making the assessment no deduction was made on account of the mortgages, hereinbefore referred to, on the property assessed, and that the franchise was blended with the roadway, road-bed, &c., in making the assessment. There is incorporated in these findings the Constitution and laws of California in relation to the assessment of property, which will hereinafter be set forth in full, and reference is made to the various acts of Congress. As a conclusion of law from the facts so found, the Court rendered a judgment for the defendant. There is no finding that any fences or steamers were included in the assessment.

Assignment of Errors.

That the said Circuit Court erred in deciding that in the assessment of the property in question the said defendant in error was, by the said State, denied the equal protection of the laws.

That the said Circuit Court erred in deciding that in the

making of said assessment the said defendant in error was, by the said State, deprived of its property without due process of law.

That the said Circuit Court erred in deciding that said defendant did not have due notice of the assessment in question in said cause.

That the said Circuit Court erred in deciding that said defendant did not have an opportunity to be heard in the matter of the assessment of its property, before the said State Board of Equalization, before said assessment became final.

That the said Circuit Court erred in deciding that the said State denied to said defendant the equal protection of the law.

That the said Circuit Court erred in deciding that said assessment or said tax was for any reason illegal or invalid.

That the said Circuit Court erred in rendering judgment on the findings for the defendant.

BRIEF.

There is nothing in this record which indicates the grounds on which the Court below rendered a judgment against the plaintiff, except as such grounds can be inferred from the nature of the answer by defendant, and of the Findings of Fact by the Court.

From an examination of these Findings of Fact, taken in connection with the pleadings in the case, and viewed in the light of the history of cases like this, and especially of the case of the Santa Clara Railroad Tax Cases (9th Sawyer, 165), it is plain that the judgment below was rendered against the plaintiff upon one or more of the following grounds:

1. That the franchises and functions of the defendant company are derived, at least in part, from the United States, as set out in paragraphs four to nine inclusive, in

the answer, and in paragraphs three, four, five, seven, eight, nine, ten, eleven, twelve, thirteen, twenty-nine, and thirty of the findings of fact, and that such defendant is now, under said laws of Congress and the franchises thereby created, an instrument and agency of the Government of the United States, engaged in its service; that said franchises, so derived from the United States, are not taxable by the States; that in making said assessments, the entire franchises possessed by the defendant, as well those conferred by the United States as those derived from the State, were blended together, and appraised and assessed as a whole; and the value of the part derived from the United States cannot be separated from the residue of the property assessed, and, hence, that the entire tax is illegal, owing to the blending of the part of the franchise which is of Federal origin, and, therefore, not taxable.

2. That the said tax sued for was assessed under section ten, article thirteen of the State Constitution; that such section makes its assessments (being self-executing) without any notice to, or hearing of, the party assessed; that the assessment in the present case was so made; and that, hence, said assessment and tax are void because made under laws which are unconstitutional in that they "take property without due process of law." (See Finding twenty-five, &c., R., 42.)

3. That whilst sections 4 and 10, article thirteen of the State Constitution, and the statutes made in pursuance thereof, allow and require, in the case of all property *not* owned by railroads and other *quasi*-public corporations, operating in more than one county, that, in making assessments for taxation, only the *excess* of the value thereof, above unsatisfied incumbrances thereon, shall be taxed, yet, in the case of railroads and other *quasi* corporations, the full value of like property of such corporations, so encumbered, is assessed and taxed, and that the assessment

was so made in the present case; and that it was so made in this case, although—

(*a.*) Much of the defendant's property was agricultural lands never connected with railroad business. (See Findings eighteen, nineteen.) And although—

(*b.*) The laws of said State, in case of like encumbered lands, provide for such deduction of encumbrances in case of all other ownerships than said railroads and *quasi*-public corporations. (Findings nineteen, twenty-six, twenty-seven, twenty-eight.) And although—

(*c.*) There is in California much other property in like predicament with the property assessed in this case as to being owned by corporations and being used and operated in business extending into more than one county and the like, as to which, under said laws, said deductions of encumbrances, in making assessments are allowed; and that, hence, said tax, sued for, is illegal and void, because made under provisions of law, constitutional and statutory, which are in contravention of the fourteenth article of amendment to the Constitution of the United States prohibiting the depriving of any person of the equal protection of the laws.

4. The last sentence in the Finding twenty-six asserts a conflict between the tenth section of the thirteenth article of the State Constitution and the fourth section of the same article in this, that it is there alleged that the tenth section provides the *same* mode of assessment, and deduction of encumbrances, for all property, both that owned by railroads and by natural persons; whilst the said fourth section suffers such deductions only where the property is that of natural persons or of corporations not *quasi*-public, and denies the deduction in case of railroads and other *quasi*-public corporations.

(Just what use is to be made of this alleged conflict is to us not yet apparent.)

The foregoing we believe to be the grounds of defense in this case, and are the subjects to which this brief will be directed.

PRELIMINARY POINT REGARDING FINDINGS OF FACT.

THE COURT BELOW FOUND AS FACTS the existence of each and all of the constitutional and statutory provisions brought into view in determining the case, both those of the State and the United States, and it made the full text of these laws, constitutional and statutory, by reference to the page, &c., where found, to be part of the facts found. But the Court did not stop here in merely finding the full text of these laws; but, on the contrary, proceeded to find what is the legal effect and results and interpretation of such laws, and it classed these interpretations of the laws under the head of findings of fact.

For example, the last sentence in Finding twenty-six undertakes to find as a fact that section 4, article 13, of the State Constitution conflicts with section 10 of the same article.

Then, again, in Finding nineteen, paragraph 4 (R., 40), there is an attempt to find as a fact that agricultural lands, owned by railroads, are in the same "*situation*" as lands, of the same character and similarly used, which are owned by private persons.

Then, again, in Finding twenty-five, it is attempted to be found as a fact that section 10, article 13, of the State Constitution is "self-executing," and further, that it does "not provide for personal or other notice to parties affected by the assessments,"—the Court thus undertaking to find, as a fact, that the notice given by section 3664 of the political code, and by other provisions of law, of the time and place and manner of assessing all property, and the requirements of the law as to property owners making returns to assessment boards, do not, as a matter of law, constitute any

notice of the making of assessments, nor give opportunity for hearing regarding the same.

Again, in Finding twenty-four, it is attempted to be found as a fact that, under *all* the provisions of the laws of California, constitutional and statutory, no right or privilege is secured to railroads to be heard in relation to the assessment of their property, and that such right is wholly denied by such laws to these corporations, whilst it is secured to all other owners.

There are many other such mere conclusions of law embraced under the head of "Findings of Fact."

Should all these conclusions of law be treated by this Court as Findings of Fact, the labors of this Court, in this review, will be much abridged, and it may even turn out that you will have little to do besides registering the judgment of the Court below.

Of course such pretended Findings of Fact, which are really merely interpretations put upon the text of the laws which are spread before the Court by reason of being found as facts, cannot, under sections 649 and 700 of the Revised Statutes, be treated otherwise than what they are, namely, conclusions of law, and not Findings of Fact. Under said sections nothing can be submitted, by stipulation of the parties, to the Court for trial except such matters as by the Constitution and laws are entitled to be tried by a jury.

It would be a most remarkable spectacle to see a jury set to try the questions which we have above pointed to as mere conclusions of law, but set down under the head of Findings of Fact.

It will thus be seen that the principal questions presented by this record are the following:

First. Inasmuch as the Constitution of California provides that in assessing property held by individuals for taxation the amount of encumbrances by mortgage is declared to be an interest in the property, and shall be assessed against the mortgage, and the value in excess of

the mortgage shall be assessed against the owner; and inasmuch, as in cases of such corporations as the defendant, operating a railroad in more than one county of the State, no such division is provided for or permitted;—is this a denial to that company of the equal protection of the laws as contemplated by the fourteenth article of amendment of the Constitution of the United States?

Second. Inasmuch as neither the Constitution of the State of California, nor any law of that State, (as is claimed by the defendant,) provides for any special notice to be given, to the defendant, of such assessment, and makes no specific provision for a hearing before the Board of Equalization, but only such notice and right to be heard as might be implied from the existence of the laws making it the duty of the property owners to make returns, and the officers to assess and apportion;—does this amount to a taking of the defendant's property, in the shape of taxes, without "due process of law," as contemplated by the fourteenth article of amendment of the Constitution of the United States?

Third. Is the property in question exempt from taxation because of its relations to the Government of the United States?

Fourth. Is this tax void because the franchise was blended with the roadway, road-bed, &c., in making the assessment?

The provisions of the Constitution and statutes of California involved in the consideration of these questions are set forth in full in the brief of the Attorney-General, and need not be here repeated.

In the beginning of this discussion we desire again to attract the attention of the Court to a fact set forth in this statement of the case, to wit, that the assessment in ques-

tion is upon the franchise, road-bed, roadway, rails, and rolling-stock of the defendant exclusively: that it does not embrace the value of the fences along the road, nor does it embrace any steamers used in connection with the business of said road, nor does it embrace any of the outlying lands granted to the company by the United States in aid of the construction of the road, and which are covered by the land-grant mortgage mentioned in the answer and findings of fact. The question, therefore, as to whether or not the method that may have been pursued by the State in assessing these outlying lands was a valid method, or whether the Constitution and laws of the State of California in relation to and affecting the taxation of such lands are valid, is not involved in this record. And we have, therefore, to consider, in the discussion of this case, simply the question whether or not what has been done under or provided for by the Constitution and laws of California in respect to the assessment and taxation of the road-bed, roadway, rails, and rolling stock of corporations such as the defendant, is a violation of the provisions of the fourteenth article of amendment in the particulars referred to in the propositions hereinbefore stated. And it is to these that we invite the attention of the Court.

When the Constitution of the State was adopted, in 1879, this railroad company existed with its road completed, and with mortgages upon it quite equal to if not in excess of the assessable value of the property. And we venture to assume that the Court will take judicial notice of so notorious a fact as that there were thousands of miles of railroad in that State, heavily mortgaged, many of the bonds of which were held outside of said State, and that could not be reached for taxation by assessments against the holders.

This property aggregated in value many millions of dollars—in this particular case alone—judging by the assessments amounting to more than $20,000,000.

The aggregate of the assessments in the cases now before the Court amounts to more than $50,000,000.

That this enormous amount of property should bear its fair proportion of expenses of government will not be denied.

The Right to Tax and the Right to Classify Property for Taxation.

Unless it can be maintained that the fourteenth article of amendment has destroyed it, the State, in the exercise of its sovereign power, has the right not only to tax according to its discretion, but also to classify property for assessment and taxation.

What the State may do in that behalf has been stated by this Court as follows, in The Railroad Company *v.* Peniston, 18 Wall., 5.

At page 29, the Court says—

"That the taxing power of a State is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument, and that it may be exercised to an unlimited extent upon all property, trades, business, and avocations existing or carried on within the territorial boundaries of the State, except so far as it has been surrendered to the Federal Government, either expressly or by necessary implication, are propositions that have often been asserted by this Court. And in thus acknowledging the extent of the power to tax belonging to the States, we have declared that it is indispensable to their continued existence. No one ever doubted that, before the adoption of the Constitution of the United States, each of the States possessed unlimited power to tax, either directly or indirectly, all persons and property within their jurisdiction, alike by taxes on polls or duties on internal production, manufacture, or use, except so far as such taxation was inconsistent with certain treaties which had been made. And the Constitution contains no express restriction of this power other than a prohibition to lay any duty of tonnage, or any impost, or duty on im-

ports or exports, except what may be absolutely necessary for executing the State's inspection laws. As was said in *Lane County* v. *Oregon*: 'In respect to property, business, and persons within their respective limits, the power of taxation of the States remained, and remains entire, notwithstanding the Constitution. It is, indeed, a concurrent power, (concurrent with that of the General Government,) and in the case of a tax upon the same subject by both Governments, the claim of the United States as the supreme authority must be preferred; but, with this qualification, it is absolute. The *extent* to which it shall be *exercised*, the *subjects upon which* it shall be *exercised*, and the *mode* in which it shall be *exercised*, are all equally within the *discretion* of the *Legislatures to which the States commit the exercise of the power*. That *discretion* is restrained only by the will of the people expressed in the State Constitutions, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National Government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by National legislation. To the extent just indicated, it is as complete in the States as the like power, within the limits of the Constitution, is complete in Congress.' Such are the opinions we have expressed heretofore, and we adhere to them now."

See also, to the same effect, Williams *v.* Supervisors, 122 U. S., pp. 163, 164.

In the light of this opinion, the sovereign and absolute power of a State to impose taxes, and to determine the extent, the subjects upon, and the mode in which it shall be exercised, cannot be disputed. If the right to classify ever could have been the subject of reasonable disputation, it has been set at rest by the decision of this Court in the *Kentucky Railroad Tax Cases*, 115 *U. S.*, 321, in which this very question was presented, and, at p. 337, disposed of in these words:

"But there is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to

the *discretion* of the legislative power, and there is nothing to forbid the *classification of property for purposes of taxation* and the *valuation of different classes by different methods.* The rule of equality, in respect to the subject, only requires the *same means and methods to be applied impartially to all the constituents of each class*, so that the law shall operate *equally* and *uniformly* upon *all persons in similar circumstances.* There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the *value* of their property is ascertained. The different *nature* and *uses* of their property *justify* the *discrimination* in this respect which the *discretion* of the Legislature has seen fit to impose.

"So, the fact that the Legislature has chosen to call a railroad, for purposes of taxation, real estate, does not identify it with farming lands and town lots in such a sense as imperatively to require the employment of the same machinery and methods for all in the process of valuation for purposes of taxation."

(See also State Railroad Tax Cases, 92 U. S., at 611.)

It being, then, settled that the State may divide property into classes for the purposes of taxation—may make farming lands, city and town lots one class, and railroads, their franchises, roadway, etc., another class—it necessarily follows that if the State of California has made such a division or classification, she has not exceeded her sovereign authority by so doing.

And it equally follows from this that the State must be the judge, and the *sole* judge, as to what classification shall be made within the limit of the power to classify. It can only become subject to legal criticism when what is done, or provided for, operates *unequally* upon different persons belonging to the *same class.* (Missouri *v.* Lewis, 101 U. S., 22.)

Now, what the State has done, and all that it has done, is to designate classes—the franchise, roadway, road-bed, rails, and rolling stock are designated as a class, and farm lands, &c., as another class—and to provide methods and

rules for the assessment of these respective classes. An analysis of the provisions of the Constitution and laws of California shows this clearly.

Article thirteen of the Constitution of the State deals with "property" alone, and not with persons or owners of property. We are aware that it has been argued heretofore, and doubtless will be again, that this article deals with persons, the basis of which contention will be presently considered. Section 1 provides that all "property" shall be taxed in proportion to its value; it then declares what the word "property" shall embrace. Section 4 provides that a mortgage, &c., shall be deemed to be an *interest* in the "property," and proceeds to provide how that property shall be assessed, to wit, the value in excess of the mortgage shall be assessed to the owner, and the "interest in the property," as represented by the mortgage, to the holder of the mortgage. It then excludes from this class of property the property (franchise, road-bed, roadway, rails, and rolling-stock) held by railroad companies, and in section 10 provides for assessing such property in its entirety to the company.

It cannot therefore be said that persons are being dealt with, or that this has any relation to classification of persons, or makes any discrimination as to persons, unless that can be extracted from the following language, viz:

"A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the property affected thereby, except as to railroad and other *quasi*-public corporations."

We have, for the purposes of this discussion, punctuated this as it is claimed it should be punctuated.

Let it be so punctuated, and what is its plain meaning? It is that a "mortgage," &c., shall be deemed and treated as an interest in the property affected thereby except as to the property of railroad and other *quasi*-public corporations.

What precedes and what follows shows that this is the meaning; that it is "property" and not "persons" that is being dealt with, and that "property" is here classified—*i. e.*, property owned by railroads and other *quasi*-public corporations is embraced in one class, and property not held by such corporations in another class.

This, then, is the mere description of classes of property.

After providing thus for the classification of "property," in section 10 provision is distinctly made for assessing these classes.

The section is here again inserted for convenience, to wit: section 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in the State shall be assessed by the State Board of Equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts.

Language cannot make it plainer that these sections cover "property," and provide for assessing in one class property not owned by railroads operating in more than one county, in the doing of which mortgages are to be deemed an interest in the property, and so assessed, and the value in excess of the mortgage is to be deemed an interest in the same property, and so assessed; and in another class "property" *owned* by railroad companies operating in more than one county, as to which no such division is to be made. It is a distinct classification of "property," and not a classification of persons.

In the answer and findings the attempt is made to make

this provision as to mortgagor and mortgagee to be a *deduction* instead of a division. It seems to us to be a palpable misapprehension of this language, or a misuse of it to call this a *deduction*.

The entire theory of the defendant's case is that there is discrimination because *deductions* are made as to individuals, and not made as to specified corporations. But we submit that this contention is not justified by the language of the Constitution.

Section four of article thirteen first declares that a mortgage shall be deemed to be an interest in the property affected thereby. Then, having divided the property between the two owners—the mortgagor, and mortgagee, at the line marked by the difference between the value of the whole and the amount of the mortgage—it proceeds, secondly, to direct that these separate interests shall be separately assessed.

It is a misnomer to call this a deduction from the interest of the owner of the property. It is simply an ascertainment of the amount of actual property *each* has, and an assessment of each accordingly. But it may be urged that the result is the same because no such division is made in case of railroad property, and therefore there is discrimination.

The railroad property is not taxed beyond its value, but it is not divided as property between the mortgagor (the company) and the mortgagee (the bondholder), and each taxed separately for his interest. Or, to state it yet differently, the mortgage in this case is not declared to be an interest in the railroad property, and the assessment is against the owner as to the entire value.

Is this an unlawful discrimination?

The answer to this question, we submit, is found in the principles of law which control the powers and rights of sovereign States to classify the property within the State for purposes of taxation.

In the consideration of the question what is the extent and nature of this sovereign right of classification of property for taxation we desire to guard against misapprehension by stating the limitations upon this sovereign power.

And we state that this power of classification is not one that is unlimited, and, by the judiciary, non-reviewable, in the sense that, under the cover of the power of classification, arbitrary and despotic power can be exercised, such as is violative of the fundamental principles of free government.

For example, under this power to classify and to tax, the Legislature has no right to adopt a system of taxation which is purely arbitrary. This is so because "*apportionment*" is of the very definition of taxation. Nor can the Legislature impose taxes for private as distinguished from public purposes. (Cooley, Const. Lim., 175; Stuart *v.* Palmer, 74 N. Y., 189.)

Hence a classification, for taxation, which classified property belonging to males and that belonging to females, separately, and imposed all the taxes upon the property of the females, would be no "classification" at all within the sense of that word in tax systems; and would be void as violative of the fundamental principles of all constitutional government. (20 Blatch., 342.) So a tax imposed for the purpose of bestowing its proceeds upon the private fortunes of individuals, would be void for the same reason. The invalidity of such pretended classification would not arise from its being violative of the fourteenth amendment specifically or in particular, but would be because it involves an attempt to exercise power outside of the prerogatives of government.

Precisely this has been held by this Court in a multitude of cases, and conspicuously in Wilkinson *v.* Leland, 2 Pet., 657, 658; Terret *v.* Taylor, 9 Cr., 43; Von Hoffman *v.* Quincy, 4 Wall., 550; Sinking Fund Cases, 99 U. S. R., 719.

The cases upon this subject will be found further collected in Cooley Const. Lim., 175, note 5, and in Bank *v.* Moher, 20 Blatch, 342.

What is meant, therefore, to be designated by, and included in, this sovereign and unfettered power, discretion and right of choice, which is held by every State in making classification of property for taxation, is not the power to disregard the fundamental principles of free government and of private property rights; but this power does mean that the Legislature, in making classification and imposing taxes, is (aside from limitations in the State Constitution) subject to *no other* restraints, in the exercise of these high discretions, than those limitations which make the boundaries of the legislative power in every constitutional government—such limitations, for example, as that property shall not be taken without due process of law; that one man's property shall not be taken to be bestowed upon another man; that the ends of taxation shall be public and not private; that the apportionment of taxation shall not be arbitrary merely, and the like.

Or, stated in another way, this sovereign power of classification for taxation is one whose boundaries are such (to here adopt the words of Chief-Justice Marshall in McCullough *v.* Maryland, 4 Wheat, 428), that "the security against abuse of the power is found in the *structure* of the Government itself."

Stated in still another form, the limitation upon this power to classify and tax (here again adopting the language of Chief-Justice Marshall in McCullough *v.* Maryland) the power of taxation "may be legitimately exercised on the objects to which it is applicable to the unlimited extent to which the Government may choose to carry it." In Bank *v.* Billings, 4 Pet., 561, the same Chief Justice says this vital power may be abused, but "the interest, the wisdom and the justice of the representative body, and its relations with its constituents, furnish the *only* security against un-

just and excessive taxation as well as against unwise taxation."

And this Court, through the same eminent Chief Justice, repeats the doctrine of the unlimited nature of this power, where he says, "it is unfit for the judicial department to inquire what degree of taxation is legitimate or wise, and what may amount to an abuse of the power." (McCullough *v.* Maryland, 4 Wheat, 430.)

The plain result of the proposition which we have now stated so fully, to wit, that the State's power and right of choice, in making classifications for taxation, is (aside from restraints in the State Constitution) bounded only by the limitations which restrain the powers of legislation in every free Government, is this one, namely, that the classification of railroad property for taxation by itself, and without the right of deducting mortgage debts, is not in excess of legitimate classification for taxation, unless so to classify and tax is such a flagrant usurpation and injustice as make it violative of the fundamental principles of property right as protected by all free Governments.

Now, is the law of California, which the defense in the present case assails, of this flagrantly-unjust character, or, on the other hand, is this discrimination complained of sanctioned by reason and justice?

We shall see that this assailed discrimination is most manifestly founded in the highest considerations of justice.

In entering upon the considerations which show this, it is essential to fix in the argument a proposition somewhat preliminary to our present position, that this discrimination complained of is no unequal discrimination, and is essentially just.

The preliminary point is this, to wit, that the criticism directed against this discrimination is founded in an utter mistake of fact. The criticism asserts that this discrimination against railroad property is an attempt to deprive "persons" who become members of a railroad corporation

of the equal protection of the law, by taxing them, merely because they are such members, enormously in excess of other citizens. This is the prominent, indeed, the "stock" objection to the legislation here assailed.

Stated in another way, the criticism is one which asserts that the American citizen is, by these laws, treated as a kind of outlaw; treated as one to be despoiled at the mere caprice of the Legislature, and this *solely* because he has entered, with his property, one of these railroad corporations.

The mistake is in the assumption that these tax laws regard and deal with the natural persons, and their separate and private property, which make up these corporations, in their natural and individual, as distinguished from their associated and artificial, character and capacity, and that the Legislature, in the very nature of the subject-matter, cannot, in imposing these taxes, regard the property invested in the corporations as in any other legal predicament or *status* than is an equivalent amount of similar property held by individuals as natural persons.

Now, it is palpable that the very opposite of this is the truth.

When the citizen enters such a corporation he does so with the purpose of obtaining, from his Government, for himself and his corporate property, very high and valuable powers, rights, immunities, privileges, and franchises which are never held by the private citizen. He asks to be endowed with some of the very highest attributes of governmental sovereignty, and some of the most valuable franchises which originally belonged exclusively to sovereign States. In asking these, he does it with full knowledge in advance that the laws of his State, and indeed of all modern civilized States, impose corresponding obligations and contributions to the Government in return for these most valuable franchises so sought and bestowed.

On entering such corporation he asks that he may be

allowed to impose tolls upon all who use these highways of the State—highways made under the exercise of the right of eminent domain—and he gets this right to levy the tolls.

He asks that he may be exempt from the laws of the State which, as against a private citizen, prohibit common labor on the Sabbath day. And he claims from the State the right to labor and take tolls on three hundred and sixty-five days in each year. He asks from the State the right to demand (what is not accorded to private travel) that all other lines of commerce shall afford to him and to his line all reasonable connections, exchanges, and facilities for business, and he receives these enforced privileges, which are not accorded to any others of the people. He demands from the State the right, without your leave and against your protest, to cut in twain your farm or the curtilage of your house, and from the State he gets the right accorded to none others of the people. He demands from the State the right to destroy your home, to penetrate the heart of your cities, to occupy with his highway your highways, and to render all these unsafe, uncomfortable, and unwholesome, and he gets from the Sate the right to do all these—rights accorded to none other of the citizens.

It is needless to go on with this catalogue of supremely important franchises and privileges so accorded to these railroad corporations, and denied to all other citizens.

What we have stated is ample for the purpose of showing that it is an utter mistake to say that property so endowed with such exceptional powers, rights, and franchises, so derived from the State, must be classified for purposes of taxation precisely like all other property of the people, which holds, and is connected with, not one of these valuable franchises which are connected with and affect, with increased values, every particle of railroad property.

In brief, these corporations possess in connection with their holdings a species of property intangible, but of im-

mense value, specially granted to them by legislative enactment, known as "franchises," which individuals do not have in respect to their holdings. It carries with it advantages of succession, perpetuity, &c., not enjoyed by individuals. It is the very life of these artificial persons.

They have the right of eminent domain; they have the privileges and immunities of common carriers; they come into being to conduct a special business intimately associated with the trade and commerce of the country, and the property they hold other than the franchise is only an incident to, or an instrumentality used as a means of making useful, this intangible yet most important part of their property, the "franchise." This franchise is inseparable from its ties, rails, &c., and it is impossible, certainly impracticable, to separate the one from the other in reaching its value; yet the fact that they were assessed together is one of the complaints made in this case. What it has in the shape of property has associated with it and inseparable from it that most valuable element, the "franchise;" franchise and road-bed and rails, and so on, go to make up the property of this artificial person. And thus it is made necessary to group them all together for the purpose of assessment; and other property, having no such element, and no such condition, justly occupies a place as a distinct class.

Again: The State in the exercise of its sovereign power could not do otherwise than make this a distinctive class without doing one of two things, viz.:

It must tax its citizens to the full value of the property held by them, respectively, irrespective of mortgages; or it must permit to escape taxation all railroad property embraced in franchise, road-bed, &c., that is mortgaged to its full value.

Such property of a railroad company, it cannot be denied, should be subjected to a tax, but it could not be liable to a tax upon the principle of making a division,

such as is provided for, above referred to, because the the holdings of the bonds secured render the collection of such a tax, if so assessed, impracticable, indeed impossible. These bonds are sold and held all over the world, as is shown by the history of such railroad bonds the world over, and are in this respect unlike all private mortgages. And so the alternative was presented either to oppress the citizen by imposing a tax on property that he only in part owned, or dividing property held under such dissimilar conditions into classes in their nature and constituent elements wholly distinct, and thereby making subject to taxation, property, which it in large part created by granting the franchise, and which without such classification would escape taxation.

Who can say that such an exercise of sovereign power was not wise?

Who can say that such a division or classification works injustice?

Who can justly say that property, thus brought into being, can be relieved from all taxation because it has been mortgaged to its full value, unless citizens whose property is the result of their own endeavors, and in no part the gift of the sovereign, shall also be taxed to the full value regardless of encumbrances?

Yet the contention of the defendant is, in effect, that the property of an individual having none of these qualities, having had no grant of a franchise, no right of eminent domain, none of the many incidents and advantages enjoyed by a corporation, standing in a position entirely different from that of a corporation, and his property being different in its characteristics and elements, must be treated exactly like that of a corporation, in respect to taxation; or rather that whatever the State may do for its citizens, in their individual capacity, as such, in relation to the taxation of their property, precisely the same thing must be done as to the property of these corporations; and the fail-

ure to treat these essentially-different classes of property held by these two classes of persons in precisely the same way, is an unlawful discrimination.

This contention of the defendant, is, it seems to us, most conclusively answered by the Court in the

STATE RAILROAD TAX CASES, 92 U. S., 575.
Society for Savings *v.* Coite, 6 Wall., 607.
State Freight Tax Cases, 15 Wall., 232.
State Tax on Gross Receipts, 15 Wall., 284.

We will have occasion to further consider this subject in another connection.

In this connection we bring attention to the twenty-eighth finding (Rec. 43), it being in substance set up in the answer.

It is attempted by this to show a discrimination against the defendant by attempting to show that there are other corporations similarly situated where deductions are allowed.

But an examination of the facts as alleged in the answer and as found in this finding fall very short of accomplishing this.

The Court will observe that it finds that corporations were formed for the purpose of operating "property" not railroad property; that there are divers natural persons, not corporations, operating "property" in more than one county; that there are railroads operated in *one* county, not more than one; that there is one railroad operated in more than one county owned by a named individual; that there is another owned by a private corporation, operated in two counties, used for the same purposes as the defendant's road; that there are divers other private corporations and individuals and partnerships owning and operating railroads, and that all of these *own lands* that are *assessed by the local assessors* and all are entitled to have deductions made, and have been allowed such deductions.

This finding that they are "entitled to have deductions made" is a mere legal conclusion; but, waiving that, we

fail to see how the facts above referred to can affect this case.

There is no averment or finding that any deduction was made on account of any mortgage of the franchise, &c.; but even if such deductions have been allowed, it could not affect the legal principle here involved.

The question is, does the Constitution make such a discrimination. Not whether the officials commited an error in dealing with special cases.

If they are of the same class as the defendant, and deductions were made, they were wrongfully made; it was an error of the officials; if they are of the same class as the defendant, the Constitution deals with them the same as the defendant, and the constitutional provision cannot be stricken down because the officers committed an error in allowing a deduction or division that the Constitution did not make. Nor can the defendant escape paying its tax because of a mistake made by the assessor in dealing with the property of some other individual, or corporation.

We insist, therefore, that there is no discrimination by which the defendant is denied the equal protection of the laws.

THE NEXT QUESTION IS, IS THE ASSESSMENT AN ATTEMPT TO TAKE THE PROPERTY OF THE DEFENDANT WITHOUT "DUE PROCESS OF LAW."

This contention of the defendant rests upon the assertion that there is no notice given of the assessment; and that while in case of individuals in respect to assessment of their property notice and a hearing are provided for before the local or county Board of Equalization, no notice of assessment by or hearing is provided for, before the State Board of Equalization, which makes the assessment against corporations such as the defendant.

There is no complaint that all corporations of the same class as the defendant are not treated alike in this regard. The complaint is, that while notice is given to one class no

notice is given to the other. *One class* is not dealt with precisely as property of corporations and individuals belonging to *another class.*

What constitutes notice, due process of law, has been fully considered by this Court in—

State Railroad Tax Cases, 92 U. S., 575.
McMillen *v.* Anderson, 95 U. S., 37.
Davidson *v.* New Orleans, 96 U. S., 97.
Kentucky R. R. Cases, 115 U. S., 331.

In the last-cited case the Court says:

"In support of these propositions, it is contended on behalf of the plaintiffs in error, that, by the enforcement of these judgments, they will be deprived of their property without due process of law, because the valuation of their property under the act is made by the Board of Railroad Commissioners without the right on their part to notice of the proceeding, or the right to be heard in opposition to any proposed action of the Board in its progress. It has, however, been repeatedly decided by this Court that the proceedings to raise the public revenue by levying and collecting taxes, are not necessarily judicial, and that 'due process of law,' as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given, and that has been held sufficient. 'In judging what is due process of law,' said Mr. Justice Bradley, in Davidson *v.* New Orleans, 96 U. S., 97, 107, 'respect must be had to the cause and the object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law.'

"In its application to proceeding for the levy and collection of taxes, it was said in McMillen *v.* Anderson, 95 U. S., 37, 42, that it 'is not, and never has been, considered necessary to the validity of a tax' 'that the party

charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed.' This language, it is true, was used in the decision of a case in reference to a license tax, where all the circumstances of its assessment were declared by statute, and nothing was intrusted to the discretion of public officers; but, in the State Railroad Tax Cases, 92 U. S., 575, 610, where the ascertainment of the taxable value of railroads was the duty of a Board, as in the present cases, whose assessment was challenged for the reason that the proceeding was not 'due process of law,' for want of notice and a hearing, it was said by Mr. Justice Miller, delivering the opinion of the Court: 'This Board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong, and in the business of assessing taxes, this is all that can be reasonably asked.'"

Without entering into details here, it is sufficient to say that the statute on which this decision was made is, in all its essential features, the same as the Constitution and laws of California, in respect of making assessments. Undoubtedly, if the State has the right to make classes of property, it has the right to fix the methods of assessing property in these respective classes, and it cannot be required to make these methods the same for all classes.

DID THE DEFENDANT HAVE NOTICE, &C.?

1. The Constitution, section 1, article 13, provides that "'all property' in the State shall be taxed in proportion to its value, to be ascertained as provided by law."

2. Section 9 creates a State Board of Equalization.

3. Section 10 provides that the franchise, &c., of railroads operated in more than one county shall be assessed by the State Board.

So here was notice in the Constitution that this property of this company would be assessed by this Board as the Legislature might provide.

4. The Legislature did make provision for such assessment, and for hearing, viz.:

3664. The President, Secretary, or Managing Agent, or such other officer as the State Board of Equalization may designate, of any corporation, and each person, or association of persons, owning or operating any railroad in more than one county in this State, shall, on or before the first Monday in April of each year, furnish the said Board a statement, signed and sworn to by one of such officers, or by the person or one of the persons forming such association, showing in detail for the year ending on the first Monday in March in each year—

1. The whole number of miles of railway in the State; and where the line is partly out of the State, the whole number of miles without the State, and the whole number within the State, owned or operated by such corporation, person, or association.

2. The value of the roadway, road-bed, and rails of the whole railway, and the value of the same within the State.

3. The width of the right of way.

4. The number of each kind of all rolling-stock used by such corporation, person, or association in operating the entire railway, including the part without the State.

5. Number, kind, and value of rolling-stock owned and operated in the State.

6. Number, kind, and value of rolling-stock used in the State, but owned by the party making the returns,

7. Number, kind, and value of rolling-stock owned, but used out of the State, either upon division of road operated by the party making the returns, or by and upon other railways.

Also, showing in detail for the year preceding the first of January—

1. The gross earnings of the entire road.

2. The gross earnings of the road in the State, and where the railway is let to other operators, how much was derived by the lessor as rental.

3. The cost of operating the entire, exclusive of Sinking Fund, expenses of land department, and money paid to the United States.

4. Net income for such year, and amount of dividend declared.

5. Capital stock authorized.
6. Capital stock paid in.
7. Funded debt.
8. Number of shares authorized.
9. Number of shares of stock issued.
10. Any other facts the State Board of Equalization may require.

11. A description of the road, giving the points of entrance into and the point of exit from each county, with a statement of the number of miles in each county. When a description of the road shall once have been given no other annual description thereafter is necessary, unless the road shall have been changed. Whenever the road, or any portion of the road is advertised to be sold, or is sold, for taxes, either State or county, no other description is necessary than that given by, and the same is conclusive upon, the corporation, person, or association giving the description. No assessment is invalid on account of a misdescription of the railway or the right of way for the same. If such statement is not furnished as above provided, the assessment made by the State Board of Equalization upon the property of the corporation, person, or association failing to furnish the statement is conclusive and final. [In effect March 9, 1883.]

(Assessment of railroad property by State Board of Equalization, Const. Cal., 1879, article 13, section 10; lying within limits of State, authorized, 13 Cal., 398.)

(Scheme of taxation prescribed by Cal. Const. and act of 1880 held to be in conflict with the Federal Constitution in San Mateo *v.* South. P. R.R. Co., U. S. Court, Dist. Cal., 13 Fed. Rep., 722.)

3665. The State Board of Equalization must meet at the State Capitol on the first Monday in August, and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the Board must assess the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county. Assessment must be made to the corporation, person, or association of persons owning the same, and must be made upon the entire railway within the State, and must include the right of way, bridges, culverts, wharves, and moles upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the

road. The depots, stations, shops, and buildings erected upon the space covered by the right of way are assessed by the assessor of the county wherein they are situate. Within ten days after the third Monday of August the Board must apportion the total assessment of the franchise, roadway, road-bed, rails, and rolling-stock of each railway to the counties, or cities and counties, in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and counties. The Board must also, within said time, transmit by mail to the county auditor of each county, or city and county, to which such apportionment shall have been made, a statement showing the length of the main track of such railway within the county, or city and county, with a description of the whole of the said track within the county, or city and county, including the right of way by metes and bounds, or other description sufficient for identification, the assessed value per mile of the same, as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, road-bed, rails, and rolling-stock of such railway within the State, and the amount apportioned to the county, or city and county. The auditor must enter the statement on the assessment roll or book of the county, or city and county, and where the county is divided into assessorial townships or districts, then on the roll or book of any township or district he may select, and enter the amount of the assessment apportioned to the county, or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation, either of the county, city and county, or such township or district. On the first Monday in October the Board of Supervisors must make, and cause to be entered in the proper record book, an order stating and declaring the length of the main track of the railway assessed by the State Board of Equalization within the county, the assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school, and road district, or lesser taxing district in the county, or city and county, through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the assessment value of said property for taxable purposes in such city, town, township, school, road, or other district; and the clerk of the Board of Supervisors must transmit

a copy of each order or equalization to the city council or trustees, or other legislative body of incorporated cities or towns, the trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes as the property of individuals within such city, town, township, school, road, and lesser taxation districts, respectively. If the owner of a railway assessed by the State Board of Equalization is dissatisfied with the assessment made by the Board, such owner may, at the meeting of the Board, under the provision of section three thousand six hundred and ninety-two of the political code, between the third Monday in August and the third Monday in September, apply to the Board to have the same corrected in any particular, and the Board may correct and increase or lower the assessment made by it, so as to equalize the same with the assessment of other property in the State. If the Board shall increase or lower any assessment previously made by it, it must make a statement to the county auditor of the county affected by the change in the assessment of the change made, and the auditor must note such change upon the assessment book or roll of the county, as directed by the Board. [In effect March 9, 1883.]

Now here is not only notice to the company, but an actual appearance by the company before the Board, in the fact that it makes this answer required by law, and not only an appearance as a party but in effect an appearance as a witness at a hearing, because it not only returns the amount of property it holds, but also testifies under oath as to the *value of the railway* as to which the return is made.

We most respectfully submit that to assert in the face of all this that the company had no notice and no opportunity to be heard, has no substantial foundation upon which to rest, either in fact or law.

The case from which we have quoted above, and the cases therein cited and quoted from, place it beyond controversy that this is notice—"*due process of law.*"

DOES THE FOURTEENTH AMENDMENT AFFECT THIS CASE?

That the classification that was made by the State is one that it could lawfully make if the fourteenth amendment had not been adopted must, we think, in the light of the authorities, be conceded, and therefore the next question is, Has that amendment destroyed that right to thus classify?

We insist that that amendment has no relation to this power of the State to impose taxes; that it does not *enlarge* the *restrictions* upon the State, which we have above stated; that, so far as the power to tax is concerned, the amendment leaves the power of the State just where it found it.

Let it be carefully remembered, throughout the consideration of the present point, that our contention is not that property held by corporations is not entitled to all constitutional protection to which other property is entitled; but our contention is that, being so entitled to all the protection secured by the Constitution to the property of natural persons, yet neither corporation property, nor the property of natural persons, is, by the fourteenth amendment, or any other constitutional provision, protected against the power and right of the State to classify property for purposes of taxation; that in making this classification for taxation and for exemption, the State is not confined to any one iron rule on which it is bound to base classification, as for example upon the actual *value of property;* that, on the other hand, in making classification the Constitutions of the States, and the laws of the States may base the classification, either in whole or in part, upon either the *value* of the property taxed, or upon the *nature* or usefulness, to the State, of the property taxed, or upon the nature of the business taxed, or upon the value and nature of the franchises held in connection with the property taxed, or upon the usefulness, to the State, of the profession or business of the persons taxed, or upon the conditions of helplessness, or inability to pay, of the persons to be taxed or exempted from taxation.

In short, this power of classification, held by the State,

has no other limitation than the sovereign pleasure of the State, exercised, however, under the restraints which limit the powers of all constitutional governments, such as that property shall not be taken without due process of law, and the like.

What led to the adoption of this amendment and what it was intended to accomplish, its "pervading spirit," never can be more forcibly stated than in the language of this Court in the Slaughter House Cases, 16 Wall. The substance of that "pervading spirit, as there declared by the Court, is to confer citizenship on the negro race, just released from bondage, and to prohibit hostile discrimination against that race; and that this amendment might be safely trusted to prohibit such slavery as Mexican peonage or Chinese cooley labor, and that "in any fair and just construction" of any phrase or section of the amendments this "pervading spirit" must be looked to, and then the Court uses this language:

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws. In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly-emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. If, however, the States did not conform their laws to its requirements, then, by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discriminating against the negroes as a class, or on account of their race, *will* EVER *be held to come within the purview of this provision. It is so clearly a provision for that race, and that emergency, that a* STRONG CASE *would be necessary for its application to* ANY OTHER."

This is repeated, emphasized, and enlarged upon in the case of *Strouder* v. *West Virginia*, 100 *U. S., at* 306.

It is again repeated in *Ex-parte Virginia*, 100 *U. S.*, *at p.* 344.

And that this Court would not permit this amendment to be strained beyond this "pervading spirit" is shown by the decision in the case of *Elk* v. *Wilkins*, 112 *U. S.*, 94.

This amendment was analyzed by Mr. Justice Wood in the *Insurance Company* v. *The City of New Orleans*, 1 *Wood*, *at p.* 87. He distinctly held that a corporation is *not a "citizen" or "person," within the meaning of the fourteenth article of amendment.*

We quote from page 88:

"Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses just quoted. If we adopt the construction claimed by complainants, we must hold that the word "person," where it occurs the third time in this section, has a wider and more comprehensive meaning than in the other clauses of the section where it occurs. This would be a construction for which we find no warrant in the rules of interpretation. The plain and evident meaning of the section is, that the persons to whom the equal protection of the law is secured are persons born or naturalized or endowed with life and liberty, and consequently natural and not artificial persons. This construction of the section is strengthened by the history of the submission by Congress, and the adoption by the States of the fourteenth amendment, so fresh in all minds as to need no rehearsal." Same thing in Ry. Co. vs Board. 60 Cal. 35

But in the *Santa Clara Case*, 118 *U. S.*, 396, "before argument," the Chief-Justice said:

"The Court does not wish to hear argument on the question whether the provision in the fourteenth amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

And in the case of *Philadelphia Fire Association* v. *New York*, 119 *U. S.*, 121, Mr. Justice Harlan, in his dissenting

opinion, quotes the remark of the Chief-Justice above, and then deals with the subject under consideration upon the assumption that it is settled that corporations are persons in contemplation of that provision of the fourteenth article, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws.

We cannot but understand that that declaration by the Chief-Justice was the result of a consideration of the question by the Court, although it was a question not necessary, or perhaps we may with propriety say, even proper, to be decided in that case, as there was in it a question upon which this case must be decided not involving constitutional law. There was another constitutional question of equal importance involved in that and its associate cases, to wit, whether the assessments were unlawful and unjust discrimination; but, while the Court, as appears by the quotation, had concluded that corporations were persons, (a constitutional question,) they did not decide the other constitutional questions above stated, and Mr. Justice Field, in his concurring opinion expresses "regret that it has not been deemed consistent with duty to decide the important *constitutional questions* involved, and *particularly* the one which was so fully considered in the Circuit Court and elaborately argued here, *that in the assessment upon which the taxes* were levied an unlawful and unjust discrimination was made," &c.

From this statement by Mr. Justice Field it might be so far inferred that neither of these questions was in fact decided, as that counsel may, without impropriety, ask that this most important question shall not be deemed concluded.

If it be true that the purposes of these amendments were as so forcibly stated in the cases above cited, and if the declaration that these purposes and the all-pervading spirit, as therein expressed and defined, is to be considered in determining what is embraced within its provisions, then these provisions *do not* embrace corporations.

But assuming that it does embrace corporations, the question still remains whether they are to be considered as standing precisely on the same footing as natural persons. They are endowed with some qualities that a natural person cannot have, and they cannot be endowed with some qualities possessed by natural persons. They cannot hold office, nor vote, nor sit on juries, and the like, and the withholding of these privileges could not be depriving them of the equal protection of the laws, although these are conferred upon all other "persons."

And therefore, even if they are persons, they are only persons of their own class, and as such are entitled only to have all, *of that class*, treated alike when the conditions are the same, or to be treated the same as natural persons when the conditions are the same.

And, if corporations are embraced as persons, there still remains the further question, is it a denial of the equal protection of the laws if, having provided for notice as to assessments against individuals by county boards, the same notice is not provided in case assessment of corporations by the State Board, and is it a denial of the equal protection of the laws to allow a division between mortgagor and mortgagee in case of the individuals and deny it in case of the corporations, for the purposes of taxation?

We insist that they are not embraced in this amendment for any such purposes or considerations. Nothing could have been farther from the minds of the makers of that amendment than the thought that it was in any way to interfere with the power of a State to regulate after its own methods, and according to its own discretion, the assessment and collection of taxes.

But it is contended now by this defendant that this language is so elastic that it can be stretched over all the affairs of corporations, and control the State in the exercise of its right of taxation as to such corporations.

We have already seen by the adjudications of this Court

how supreme and absolute is the power of a State as to taxation.

That was a known and thoroughly recognized right, a right indispensable to its existence, a right which cannot be hampered or trammelled, except by the clearest prohibition by its only superior, the Constitution of the United States. And we most respectfully submit that the language well known to have been intended to subserve one purpose, the "pervading spirit" of which is to accomplish the purpose stated by the Court, cannot, without violence, be used *to strike down a sovereign right of a State.*

Certainly such right of the State would not be held to be trespassed upon by the Constitution of the United States without the clearest provision. No doubtful or uncertain language could have that effect, and this is especially so in the matter now under consideration, because it is a right of such supreme importance, and because of the express reservation in favor of the States of all power not expressly delegated.

There has been no utterance of this Court that we have seen that qualifies or casts any doubt upon *this* declaration in the Slaughter House Cases, viz., "that a strong case would be necessary for its application to any other," *i. e.*, the protection of the negro race.

Now, is this such a case?

If it is conceded that corporations are persons within the fourteenth amendment, it must, on the other hand, also be conceded that they are not so in all legal respects; and we insist that they are not so in the sense and to the extent that the State has been deprived of its power to classify their property for taxation according to its own sovereign will.

But to the position now stated, that the tax upon defendant's property is vindicated by the inherent and sovereign right of the State to classify property and to tax it according to its class, the reply is made that this power

to classify is, in California, subject to the other constitutional rule, that it matters not what classification may be adopted, each and every class and item must be taxed under one and the *same* rule of assessment, to wit, that it "shall be taxed in proportion to its value, to be ascertained as provided by law;" that in the case at bar no complaint is made as to the per cent. or *rate* of taxation, as there is no difference in the *rate* assessed against defendant and others, nor is the complaint that defendant's property is classed by itself; but the complaint is that "a different rule is followed in ascertaining the value of the property of railroad corporations, as a basis for taxation, from that followed in ascertaining the value of property held by natural persons. In estimating the value, in one case, certain elements are considered by which the value, as a basis for taxation, is *lessened;* in estimating the value, in another case, those elements are omitted by which the valuation is proportionally *increased*" (9 Sawyer, 199, 200); that "classification" of property, for taxation, must be based upon the "difference in the *nature* of the different parcels of property," or on "the different uses to which it is applied" (9 Sawyer, 199); that, under this power of classification, based on the nature and uses of property, school property, church property, and other property not held for private gain may be classified as exempt, because of the benefits done to the State, without violating the fourteenth article of amendment (9 Sawyer, 189); but that all this does not justify the present tax, because it taxes *all* the property of the railroads by this radically-different and more-burdensome rule of assessment, including such as its farms and other lands not at all connected, in point of use, with the railroad, and this although these lands differ in no respect from the lands of the people generally, except in the fact that one is owned by a railroad and the other not.

This, it is asserted, is no legitimate "*classification*" any

more than it would be legitimate to classify all property owned by *white* persons as exempt, and that owned by *colored* persons as alone taxable.

This is, in its substance, a strong statement, by Mr. Justice Field, in Santa Clara Case, of the whole argument against this tax so far as based on the allegation of denial of equal protection. It is, in substance, the same argument which, in different views, we have already considered. But we here restate it, in the shape just repeated, not only because it brings into view objections to what we have said regarding the vindication of this tax on the ground of the sovereign power of the Legislature to classify property and to tax according to the class, but also because it is the strongest statement of the case for the defense which we have seen.

Now, an analysis of this statement of the defense shows that it includes in it the following elements:

First. That owing to the prohibition in the fourteenth article, against denying equal protection, no State can extend or deny to any owner or class of owners of property, held for private purposes, any exemption on account of the ability, or lack of ability, of the owner to pay, or on account of the wants or condition of his family, or on *any* account which relates to the condition of the owner, which is not extended to all owners of private property.

Second. That in exercising its sovereign right of discretion and choice, regarding the subject, method, and rules of taxation, no State of the Union, since the adoption of the fourteenth amendment, holds any power to regard or treat any railroad property, not actually used in operating the road, as being, for the purposes of taxation, "*affected*" by the supremely-valuable franchises and powers bestowed, by the State, upon such railroads.

Third. That although the States may, notwithstanding the fourteenth amendment, exempt from taxation all prop-

erty held by private owners for the purposes of education, religion, or charity, this because the benefits which these do to the State may be received as equivalent to the taxes remitted, yet the State may not deny to railroads any exemption from taxations on account of the enormously-valuable franchises, rights, privileges, and immunities which these derive, by gift, from the State; nor yet on account of the exceptional burdens, damages, &c., which these roads inflict upon the State and its citizens.

That each of these three propositions is in plain conflict with reason, the practices of all these States, and with authority, seems to be exceedingly plain.

If it indeed be so that the fourteenth amendment has rendered it unlawful for the Legislature to make discriminations on account of the condition or the ability or the usefulness of the taxpayer, or if such amendment has rendered it unlawful to tax property held by corporations, but not connected with their corporate business, differently from the similar property held by private citizens, or if that amendment has left it lawful to exempt property which *lightens* the burdens of government, owing to its nature and use, such, for example, as property used for schools, for religion, and for charity, and yet at the same time renders it unlawful for the Government to *increase* the taxes upon corporations whose business and whose endowments, by the State, have greatly increased the burdens, the expenses, and the discomforts of the Government and its citizens, and whose emoluments have been enormously increased by reason of the franchises bestowed by the States—then, indeed, has this fourteenth amendment wrought an invasion of the powers and autonomy of the States which was not dreamed of by its makers; it has brought about a revolution in the systems and principles of taxation which strikes down some of the most salutary and long-continued practices of the States, and has taken from these States powers of taxation which have been

conceded to them by the unanimous consent of authority and reason.

Take, for example, the matter of the right and the propriety of the Legislature, looking to the *condition* of the taxpayer, in determining upon his taxation and his exemptions.

The position just quoted from 9 Sawyer is one which says that the fourteenth amendment has abolished the right to impose different taxes upon the same kind of property owing to the difference in the condition of the owner of the property. Can it be possible the fourteenth amendment has this effect? To illustrate: All the States of this Union have deemed it wise and lawful to exempt heads of families, of limited means, from great varieties of taxation, such as poll taxes, income taxes, taxes on household goods, and the like, and yet to impose these taxes upon the more opulent, or upon those having no families to support. It is alleged that the fourteenth amendment has rendered this unlawful. All States have found it wise to encourage the immigration of skilled artisans, artificers, manufacturers, and the like by securing to them exemption from certain classes of taxation which the State has found necessary to impose upon the majority of the people. Now it is alleged that the fourteenth amendment has rendered this also unlawful. All States have found it wise to encourage the professions of teachers in literature and the useful arts and in religion; and have, accordingly, exempted these from certain taxes which are imposed upon the majority of the people. This discrimination in favor of teachers and professors and ministers of religion, it is alleged, is now rendered unlawful by this fourteenth amendment. The States have found it wise to assess against certain very lucrative pursuits and professions exceptional taxes, and have therefore subjected the profession of the law, and many other exceptionally lucrative pursuits, to taxation not imposed upon other pursuits.

This, too, it is alleged, the fourteenth amendment has rendered unlawful. Most, if not all, new States have found it wise to exempt from taxation the newcomers settling in such States for a period of time, this on account of the hardships incident to the beginning of life in new places. All this is rendered unlawful by this fourteenth amendment. All States have found it essential to exempt from certain taxes persons who are in exceptionally dependent or helpless or necessitous conditions, such as the poor, having not exceeding a designated amount of property, widows having dependent upon them for support children, and the like. Now this exemption is declared to be rendered unlawful by the fourteenth amendment.

All States which have granted to any of its citizens specially-valuable monopolies or privileges, such as rights of wharfage, ferries, bridges, and the like, have found it wise to assess against the owners of these, special and heavy contributions, in the nature of taxes, to the State. These taxes are alleged to be prohibited by the fourteenth amendment.

But, especially above and beyond all other examples and illustrations, we now state that illustration which is the very case now at the bar of this Court, namely, that every State of this Union, and, indeed, every other modern civilzed State, has deemed it wise and just to apply to that class of artificial persons called "corporations," which ask and receive from the State those supremely-valuable franchises with which great moneyed corporations are endowed—such as the right to impose tolls upon the people, the right to take private property without the consent of the owner, the right to occupy and interrupt the highways of the State, the right to do, and to exact from its employés, common labor on the Sabbath day, the right to enjoy legal immortality, the right, in case of banks, to make, issue, and enjoy the profits of, the money of the State—special and exceptional rules of taxation. Hence, in every State, so far as we have examined, these moneyed corporations have been taxed upon exceptional and special systems of taxation.

Now, it is alleged that all this is also rendered unlawful by the fourteenth amendment.

These are examples of the consequences which are to result from holding that the fourteenth amendment prohibits all discriminations, in taxation, based wholly or mainly on the character or condition of the owner of the property. And these illustrations also apply to the second proposition above named, to wit, that the fourteenth amendment prohibits discrimination, in taxing railroad property not actually used in exercising the corporate franchise. The laws taxing corporations as such, to which we have just alluded, have usually, and as a matter of practice, taxed the *entire* corporate property by the same rule of assessment, whether used in connection with the franchise or not.

We have said that the position just quoted, from 9 Sawyer, denying to the States the power to base their classification for taxation, in whole or in part, upon either the condition of the ownership, or upon the privileges and franchises bestowed by the State upon the owner, or upon the nature of the use of the property and its profitableness, or upon any other rational grounds which the Legislature might select, is a position not supported by authority or by the practices of the States.

The general rule upon this subject is thus stated in Cooley on Taxation, 145: "The general right to make exemptions is involved in the right to apportion taxes, and *must be understood to exist wherever it is not forbidden.*"

It must, of course, be here kept carefully in mind that this Court, in determining whether the Constitution of California violates the fourteenth amendment, is dealing *alone* with the Federal question. This Court is not herein dealing with the question whether, in taxing lands of railroads, as they were taxed in the present case, under the laws of California, the tax was violative of that provision of the Constitution of California which requires taxes to be assessed

according to value. On the contrary, the only question, touching the present point, is whether, when the Constitution and laws of California tax the defendant's property, as was done in the present case, they have violated the provision of the fourteenth amendment securing equal protection. And that question, whether said taxation, as assessed in this case, is not "equal protection," remits us to that fundamental and ultimate question whether, according to the powers and practices of modern States, it is so radically unjust and unequal to tax railroad property by a system different from that applied to private citizens, as that the discrimination violates the fundamental rights of property, and the fundamental principles of all free governments.

It is to this question that the discussion must always come back. It is the Constitution of California that is here on trial, and it is not some supposed conflict of the statutes of California with the Constitution of California. On this conflict this Court will follow the Supreme Court of California. The question, on the contrary, is whether the Constitution of California, together with the statute thereunder, in taxing this railroad property as they do, violates the provision of the fourteenth article, which simply secures to the people of the State equal protection. And whether the tax assessed in this case violates the ~~question~~ rule of equal protection, must be decided by ascertaining whether our States have, or have not, held and exercised that power of classification and taxation which was applied, in the present case, to the property of the defendant.

If, for example, the Court should find that the Constitutions and laws of the States of this Union have, hitherto, made, and do now make, such discriminations, in their tax system as is here complained of, and if the Court should find that, to give to the fourteenth amendment the construction here insisted upon by the defendant, would be to strike down many of the Constitutions and laws of the States of this Union, then this Court will not give the fourteenth amendment such an interpretation.

Reduced to its last analysis, the position taken here by the defendant, that the clause in the fourteenth amendment, securing equal protection, is one which *forbids* taxation of railroad property in a class by itself, and upon a mode of assessment different from that applied to natural persons, is a position which inserts in the Constitution of every State of this Union a prohibition restraining the State Legislatures from making just such classifications of property, for taxation, as have been made during the entire history of these States, and compels the Legislature to adhere to one fixed iron rule in taxing all property, and this without regard to the dissimilarity of the subjects of taxation in the matters of the condition of the ownership thereof, the special emoluments, profits, and privileges enjoyed by such ownership, and regardless of all other differences in the condition of the property and of its ownership.

How radical will be the revolution which the insertion of such a provision in the Constitutions of the States would be, becomes apparent by a glance at the tax systems of the States and at the kind of exemptions and distinctions which have been and are now tolerated by such tax systems.

Of course it is impracticable, and besides would be improper to insert in this brief, an extended examination of the Constitutions and laws of the States which would be stricken down if the fourteenth amendment should receive the construction insisted upon.

The existence of the exemptions from taxation, and the discriminations, in modes of assessment for taxation, which we have enumerated above as things that would be rendered unlawful by the defendant's interpretation of the "equal protection" clause of the fourteenth amendment, are so universal, so conspicuous, and so important, as embodied in the Constitutions and laws of the States, that this Court and all courts will, where these features of tax systems become material, take judicial notice of them.

The fact is, that if the equal-protection clause of the

fourteenth amendment has rendered it unlawful to insert in the Constitutions and laws of the States discriminations based upon the nature of the franchises and privileges held by the taxpayer, or upon the nature of his business, or upon his ability to pay taxes, or upon the nature of his profession or pursuit, then this amendment has radically invaded the tax systems of all the States of the Union, and has deprived the States of some of the most valuable and indispensible elements of their sovereignty.

It being the cardinal principle of that part of the defense which relies on the "equal-protection" feature of the fourteenth amendment, that no classification is lawful, under that amendment which denies exemptions to one class which it extends to another class, or which applies a special system of taxation to one class of owners which is different from that applied to the body of the people, or which bases taxation or exemption upon the *special* character of the business, or of the property, or of the franchises enjoyed, or of the ownership, it, manifestly, follows that such constitutional provisions and laws as we name below can no longer either be enacted or exist, in the States, under our present Constitution.

We select at random some specimen laws which have received judicial sanction as valid laws, and which must perish if this position of the defense is sustained by this Court.

Section 3 of article 12 of the Constitution of Ohio prohibits *deduction* of debts from the "dues" owned by banks in listing them for taxation. But as to private persons, no such prohibition is in the Constitution. Section 2 of the General Tax Law of 5th of April, 1859, allows individuals to deduct *bona-fide* debts from their "dues" in listing for taxation. This must perish upon the theory of the defense.

In Commonwealth *v.* Bank, 5 Allen, 428, a tax which was held to be a purely franchise tax of one-half per cent., assessed on the deposits in savings banks, was held valid.

This tax, imposed on the principle of taxing in proportion to the value of franchise and business, must be abolished under defendant's theory of the effect of this fourteenth amendment.

Illinois Central R. R. Co. v. McLean (17 Ill., 291), held valid a tax in the form of a part of the earning of the road, in lieu of all other taxes. But if the fourteenth amendment prohibits a basing of taxation upon the nature of the franchises enjoyed and the amount of business done, then this law of Illinois is void.

In Savings Bank *v.* Rochester, 37 N. Y., 366, 367, a statute of 23d of April, 1886, which declared the privileges and franchises granted by the Legislature to savings banks to be personal property, and which taxes them as such, was held valid. But since the defendant's interpretation of the fourteenth amendment renders void all taxes based, in whole or in part, on the value of the franchises enjoyed, therefore, this law of New York is also void.

In R. R. Co. *v.* Dennes, 116 U. S. R., 665, this Court recognized and treated as valid an act of Louisiana of 28th of April, 1853, which excepted from taxation the capital stock and all the property of a railroad company for *ten years* after completion. This law must be held void under defendant's interpretation of the fourteenth amendment, because the exemption is based on the nature and condition of the property owner, and upon its not being ten years old.

In Tennessee *v.* Whetworth, 117 U. S. R., 229, and in another case between the same parties, 117 U. S. R., 140, the Court recognized, and treated as valid, similar exemptions of railroad property by the laws of Tennessee, the exemptions being based on the nature of the franchise held, and the newness of the enterprise. These laws are invalid under the defendant's interpretation of the fourteenth amendment, because their discrimination is based solely on the condition and nature of the party exempted from taxation.

In Ruggles *v.* Kimball, 12 Mass., 337, and in Gridley *v.* Clark, 2 Pick., 403, the Supreme Court held the laws of Massachusetts of 1811 and 1821, exempting ministers of the Gospel and professors in colleges from taxation, on account of their occupation, to be valid.

According to the theory of the defense, all such laws must now be held void, because prohibited by the fourteenth amendment.

In Boody *v.* Watson, 63 N. H., 320, the statute was held valid which authorized towns to exempt manufacturing property from taxation for a term not exceeding ten (10) years.

Under defendant's interpretation of the fourteenth amendment, this law of New Hampshire is void, because it bases an exemption upon the nature of the tax-payers' business and his youthfulness in that business.

In Ramsey County *v.* Ry. Co., 33 Minn., 537, the Supreme Court recognized as valid the statute of Minnesota of 1878, chap. II, secs. 128 and 129, which provided that if the railroad paid a certain percentage of its gross earnings to the State, then the road and all other property, estate, and effects of said corporation, held or used for, in, or about the construction, equipment, renewal, repair, maintaining or operating its road, including *the lands granted* to the company to aid in the construction of said road, should be exempt from taxation. Here, again, the exemption is based upon the condition of the owner, and the nature of the business, and this law must perish under defendant's interpretation of the fourteenth amendment.

In Railway *v.* R. R. Commissioners, 112 U. S. R., this Court recognized as valid the twenty-eighth section of the act of the State of Arkansas, of the 11th of January, 1853, which exempted from taxation the capital stock of the company, until the road should pay a dividend of six (6) per cent., and exempted the road itself and its other property for twenty (20) years from completion. This statute

is void by defendant's interpretation of the fourteenth amendment, since it bases the exemption on the youthful condition of the enterprise, &c.

In Gaslight Co. *v.* Brooklyn, 89 N. Y., 409, the Court held the law of New York of 1880, chapter 542, clause 3, which exempted manufacturing corporations from certain taxes, to be valid. This act is overthrown by defendant's interpretation of the fourteenth amendment, because it bases taxation and exemption upon the usefulness of the taxpayer's business.

The opinion of the Court in Welles *v.* Railroad Co. (14 Blatchford, 426, 428, and 429) contains a rather striking presentation of the precise points which we have last considered. It is a case where the petition, for an injunction restraining the collection of taxes, was based upon the proposition that the face of the law, under which the taxes were assessed, showed that it gave to a certain railroad a ten years' exemption of its property from taxation, whilst the *same sort* of property of complainant was not so exempt; and by reason of said exemption, complainant's taxes were *increased;* and hence, it was asserted that the law was unequal, unconstitutional, and void. The Court, in rejecting this contention, strongly states the unlimited and unassailable nature of the discretions, held by every Legislature, to make these classifications and discriminations in taxation. It enumerates amongst the discriminations and exemptions, so made by Legislatures, the following: Unimproved lands; lands improved less than two years; exemption from poll taxes until a certain age attained; exemption of cattle, horses, sheep, and swine up to a certain age, &c., &c. After making this enumeration, the Court adds these words:

"And the Legislature has frequently, in its discretion, for the sake of encouragement to laudable enterprise, made particular exemptions, important in character, when considered in connection with the tax-paying property left—

like the exemption of the whole township of Wheelock from all public taxes (Morgan *v.* Cree, 26 Vt., 773); the exemption of the Vermont Central Railroad from taxation (Vt. C. R. R. Co *v.* Burlington, 28 Vt., 193); the exemption of certain persons (Wheeler *v.* Lane, 15 Vt., 26), and many others of like character. The right to make these exemptions has stood *unchallenged* until the present case, and the want of it is *not consistent with the idea of the sovereignty that belongs to a State.* So firmly settled is the power of the Legislature of a State to make exemptions from taxation, that, when a franchise is granted by a Legislature free from taxation, it is not within the power of it to afterwards withdraw the exemption by repealing the law that created it, or by any other legislation. (Gordon *v.* Appeal Tax Court, 3 How., 133; State Bank of Ohio *v.* Knoop, 16 How., 369; Vt. C. R. R. Co. *v.* Burlington, 28 Vt., 193.) The power to make such exemptions, unless restrained by constitutional provisions, must rest with the Legislature of every State, *to be exercised in its own discretion.* As is said in the opinion of the Court, in State Bank of Ohio *v.* Knoop, by Justice McLean, 'The taxing power may select its objects of taxation. * * * Now, the exemption of property from taxation is a question of *policy*, and not of *power*.'"

Now, this case is a statement of each one of the propositions which we have been considering.

It is an assertion of our main proposition that the limitation upon the powers of a State Legislature to make classification for purposes of taxation is (aside from limitations contained in the State Constitution) only to be found in those fundamental limitations imposed upon the power of all free governments which protect private property—this doctrine being asserted, by this Court, in the words above quoted, to wit: "Now, the exemption of property from taxation is a question of *policy*, and not of *power*." (16 How., 384.)

It (Welles *v.* R'y Co., 14 Blatchford, 428, 429) is a strong assertion of the power of every sovereign State to base discriminations in taxation and exemptions upon the

conditions and character of the tax payer, or upon the character of his pursuits or profession, or upon his utility to the State, or upon the burdens he imposes upon the State or the people, or upon the value of the franchises he derives from the State, or the like.

It is an assertion of our other proposition, that discriminations in taxation, or in exemptions therefrom, which are based on such considerations, is not violative of the rule that requires taxation to be "apportioned," and not to be arbitrarily assessed upon a few, regardless of all considerations of justice.

It would be useless to extend these examples. They have been given for the purposes of illustration, and for the purpose of indicating the startling consequences which must follow the interpretation of the fourteenth amendment, upon which the defendant insists.

The interpretation of the "equal-protection" clause of this fourteenth amendment, which so invades the most vital elements of the sovereignty of the States, and which must work an overthrow of a large proportion of their laws, will not be lightly adopted by this Court.

But to this position of ours—alleging, in substance, that railroad corporations may be denied this right of deducting mortgages, in listing their property for taxation, which is accorded by the Constitution to other citizens, without this being a violation of "the equal-protection" clause of the fourteenth amendment, because of the peculiar nature and the peculiar value of their franchises and the resulting peculiar emoluments, &c., bestowed by the Government upon these railroad corporations—reply is made which appears in the briefs of the railroads in cases analogous to this, and is found, as well stated as it is anywhere, in the opinion of Justice Sawyer, in the "Santa Clara Railroad Tax Case." (9th Sawyer, 240, *et seq.*) This reply is somewhat specious, but is, we submit, unsound.

Its substance is this:

It is said by the railroads that the denial to them of the

right to deduct mortgages cannot be defended as being in the nature of a tax on their franchises, because, by section one, article thirteen of the Constitution, all property is required to be taxed in proportion to its value, and franchises are there declared to be "property;" that hence, in legal contemplation, these railroad franchises are appraised, listed, and taxed, by the Board, at their full value, but distinct from the other and the tangible property of the railroad corporation; that hence, the State having already taxed the franchise, distinctively and in effect separately from other property, at its full value, it therefore becomes, and is, a denial of "the equal protection of the law" for the State to deny to the railroad company said right of deduction of mortgages; this on the score of the company's having received said franchises, so already appraised and taxed at their full value.

Judge Sawyer expresses this idea at the conclusion of his remarks on this point (9th Sawyer, 241) in these words:

> "*Their franchises* have, therefore, already been otherwise assessed at their value—all the Constitution will allow—and this discrimination is not, and cannot be, under the Constitution of California, a franchise tax."

Now, whilst this position may be regarded as somewhat specious, it yet seems to us that the suggestion of a few considerations makes plain its unsoundness.

Observe, therefore, first, that the thing here on trial is not some statute of California for a violation of the State Constitution. On the contrary, the thing on trial is that part of the Constitution of the State which accords to the citizens generally said right of deduction of mortgages, whilst it denies the deduction to railroads. This denial is alleged to violate the "equal-protection" clause of the fourteenth amendment. Therefore, the question is whether the constitutional clause, which *separates* railroads from other taxpayers and taxes them, as it does in section ten, article thirteen, by treating their property as a unit, in-

cluding in that unit "the *franchise*, roadway, road-bed, rails, and rolling-stock," and assessing these "at their actual value," and in depriving them, in section four, of the right to deduct mortgages, is, because of said denial of said right of deduction, a denial of equal protection.

It is alleged to be such a denial because of said fact that said franchise has already been made to bear a full and, in effect, separate tax upon its full value, as required by said section one, article thirteen; and, therefore, to impose upon the owner of said franchise said denial of said right of deduction, on account of his said ownership of said franchise, which has, as aforesaid, already paid its tax in full, is unjust and a denial of "equal protection." The palpable error of this whole reply is in the assumption of said fact of the *separate* appraisal, assessment, and taxation of said franchise at its full value.

Tangible property is, usually, perhaps universally, capable of separate appraisal and taxation, viewed independently of any system of laws. This is never possible as to these railroad company franchises. It is a legal impossibility to deal with them, appraise them, or tax them, considered as an integer, and separated from the provisions of the law which creates them, and assesses them and taxes them as an inseparable part of the unit called "the corporate property." This is not only self-evident, but is often enforced by the decisions of this Court, as for example in "State Railroad Tax Cases," where the Court says:

> "By virtue of this privilege or franchise this (body of railroad property) *is all aggregated into a unit*, well adapted to make money by its use in that way, with a chartered right to use it for that purpose." (92 U. S. R.)

We have already quoted from this and other cases what abundantly shows that a corporate franchise is, for the purposes of appraisal, assessment, and taxation, never treated, and cannot be treated, as a separate unit, divorced

from the laws which create it, and which, as a whole, determine its value.

Therefore it is an utter mistake to say that these corporate franchises have been separately or specially assessed at their value, and as such taxed.

They are, on the contrary, assessed and taxed precisely as section 10 says, to wit, along with "roadway, road-bed, rails, and rolling stock." Therefore, in appraising this railroad property as a unit, to wit, "the franchise, roadway, road-bed, rails, and rolling stock," the Courts must regard the State Board as having done its duty in making the appraisal of this property, and that such Board must have recognized the fact that the value of that property, including said franchise, *is affected and lessened* by the fact that the said Constitution denies to this property the right to make deduction of mortgages. Therefore it is an utterly false assumption to assume that these franchises have once paid their taxes upon a valuation made upon the theory that they, *like other citizens, have said right of deduction.*

Other citizens' property is assessed for taxation and its value *increased*, in contemplation of law, owing to their said right to make said deduction. Railroad property, on the other hand, is assessed upon the opposite hypothesis, to wit, the hypothesis that it *cannot* make said deduction; and, therefore, in contemplation of law, the valuation of *this* railroad property, for taxation, is correspondingly *diminished*, and the taxation therefore lessened.

Thus, exact equality is worked out as to these two classifications of property as near as equality is possible in tax systems.

It is no reply to this to say that the Court below found, as a fact, that the Board made no deductions of mortgages in making this assessment.

Our reply does not proceed on the idea of any such deductions being made. On the contrary, it only says that, in contemplation of law, *all* railroad property is valued and

taxed *lower* than similar property of other citizens, *because* of the fact that the former are *not* entitled to said deductions, whilst the latter are so entitled.

3d. The question presented by this record, whether or not this property is subject to taxation by the State by reason of its relations to the United States, can hardly, we submit, now be considered a debatable one.

This case certainly is not distinguishable from Thompson *v.* The Railroad Company (9 Wall.), and Peniston *v.* The Railroad Company (18 Wall., *supra*). U. S. *v.* W. P. Railway Co., 98 U. S., 619.

Upon the decision of this Court in these cases we rely to maintain the right of the State to tax this property of the defendant involved in these assessments.

4th. As to the point that the franchise was blended with the roadway, &c., in making the assessment in question, we reply:

1st. That it was a franchise granted by the State and not by Congress.

2d. That such a franchise is subject to taxation. (92 U. S., at p. 603.)

3d. And may be blended with capital stock. (*Ibid.*)

4th. If it may be blended with capital stock it may be blended with road-bed, roadway, &c., without which it is valueless, and without the franchise the road-bed, roadway, &c., have only the value of wood and iron. (*Ibid.*)

5th. The usefulness of these depends upon the use of them in connection with each other—as a whole—and the wisdom of dealing with them as a unit has always been recognized. It was approved in the Tax Cases. (92 U. S.) If this defendant railroad property were to be sold under a foreclosure, no Court would for a moment entertain the proposition to sell the road-bed, the roadway, the rolling-stock and the franchise separately, and especially would a

proposition to sell the franchise separately from the road-bed, &c., not be entertained.

What we have said above as to case No. 664, applies equally to each of the other cases. As stated in the beginning, we selected case 664, because the contention as to the "fences" and "steamers" being embraced in the assessment is expressly excluded.

But these are also excluded from the other cases, as follows:

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 661.

In the answer (Rec., p. 16) it is averred that fences were included in the assessment.

By the stipulation (p. 44) it was agreed that the affidavit of the clerk of the Board of Equalization might be filed as to whether or not the fences were included, and that that affidavit should be conclusive as to that issue.

The record does not show whether such affidavit was filed or not, but it does show that the assessment was made upon the "franchise, road-bed, roadway, rails, and rolling-stock" (Complainant's Rec., p. 1); and the Court found, as a fact, that this was the property assessed (Rec., p. 45); and the Court does not find that fences were embraced in the assessment.

It cannot, therefore, be said that the value of the fences is embraced in this assessment.

The same is true as to—

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } No. 660.

The assessment is specified to be upon franchise, road-bed, roadway, and rolling-stock. (Rec., p. 1.)

Answer avers that fences were included. (Rec., p. 7.)

Stipulation that affidavit of clerk on that subject should be conclusive. (Rec., p. 38.)

The Court found that the assessment was made upon franchise, &c., (Rec., p. 39,) and there is no finding that the fences were included.

The same is also true as to—

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE NORTHERN RAILWAY COMPANY. } No. 662.

Assessment on franchise, &c. (Rec., p. 1.)

Averment in answer that ferries and fences were included. (Rec., pp. 10, 11.)

Stipulation that affidavit of clerk should be conclusive. (P. 20.)

Finding that franchise, &c., were assessed. (Rec., p. 20.)

And no finding that fences and steamers were included in the assessment.

The same is true also as to—

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE CALIFORNIA PACIFIC RAILROAD COMPANY. } No. 663.

—as will appear by reference to the following portions of the record:

Assessment on franchise, &c. (Rec., p. 1.)

Averment in answer that fences and ferries were included. (Pp. 10, 11.)

Stipulation that affidavit of the clerk on that subject should be conclusive. (Rec., p. 19.)

Finding of the Court that the assessment was upon franchise, road-bed, &c. (Rec. p. 20.)

There was no finding that they were included.

But in the case of—

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } No. 1,157.

—the Court found that the fences were included in the assessment. (Rec., p. 44, par XXII.)

But there is no finding as to the value of the fences, or anything to indicate the extent of such fencing.

In the Santa Clara Case (118 U. S.), the Court held that the tax could not be recovered because in making the assessment the value of fences had been included. In that case the value of the fences was found to be $300 per mile.

In this case the finding is that the State Board "did * * * include the value of the fences erected upon the line between said roadway and the land of coterminous proprietors."

To what extent such fences existed is not found; whether there were fences of any "*material value*" is not found. (Santa Clara Case, 118 U. S., at p. 416.)

Here, then, was an assessment upon property (franchise, road-bed, roadway, rails, and rolling stock) which was legally assessable, and made by the proper authority and in a lawful way.

The defendant is seeking to avoid the payment of that tax; and we submit that it is not sufficient to make void that assessment to show simply that the value of fences is included without showing also that that assessment was "*materially*" affected by such inclusion.

It is for the defendant to *show* an injury. The Court cannot be left to infer that there was an injury. We, therefore, ask that all of these cases be reversed.

S. SHELLABARGER,
J. M. WILSON,
Attorneys of Plaintiffs in Error.

124-1

JAN 4 1888

IN THE

Supreme Court of the United States.

OCTOBER TERM 1887.

No. 664.

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

No. 660.

SAME

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

No. 661.

SAME

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY.

No. 662.

SAME

vs.

THE NORTHERN RAILWAY COMPANY.

No. 663.

SAME

vs.

THE CALIFORNIA PACIFIC RAILROAD COMPANY.

No. 1,157.

SAME

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

BRIEF FOR PLAINTIFFS IN ERROR,

By GEO. A. JOHNSON,
Attorney-General of the State of California.

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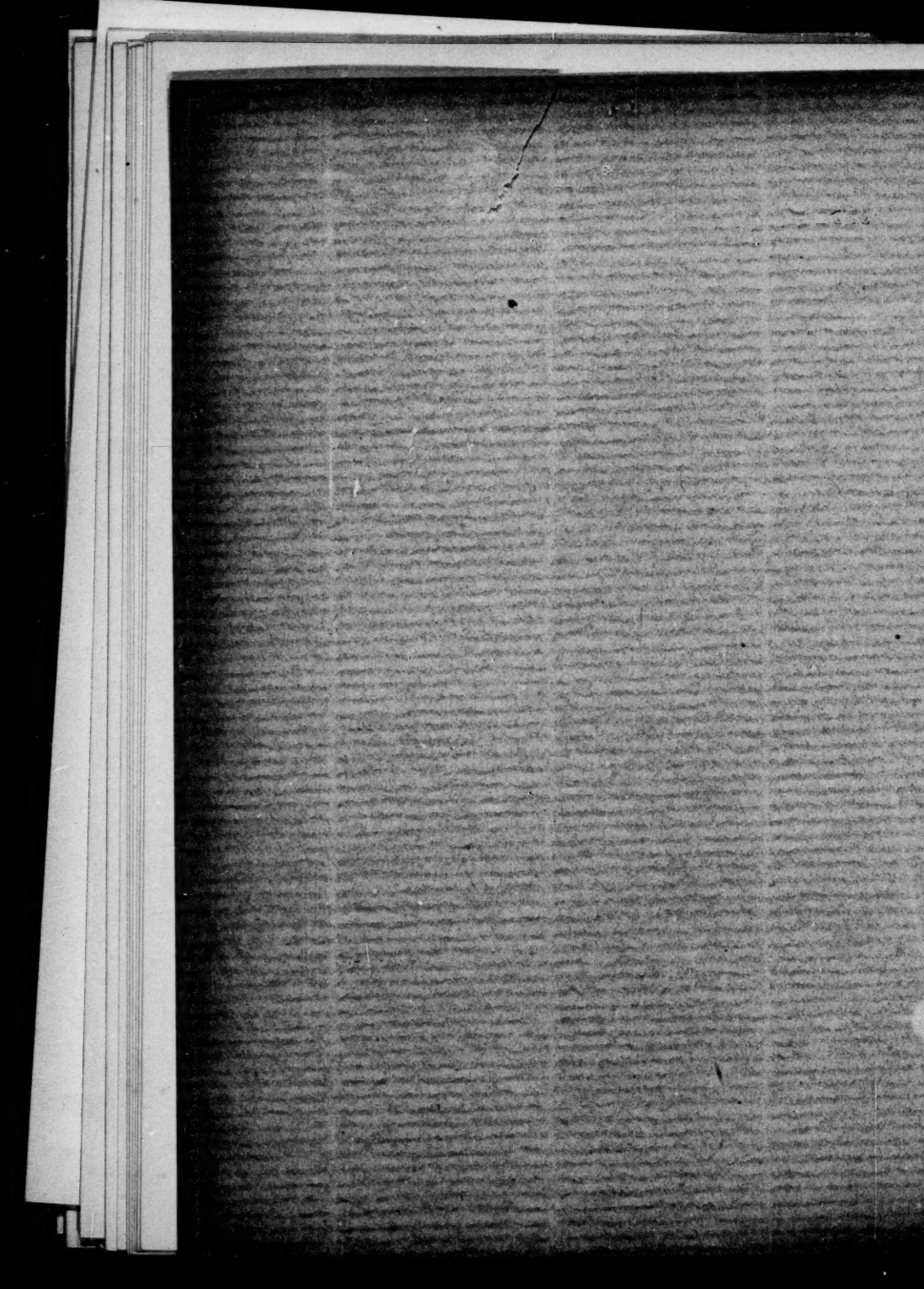

IN THE

Supreme Court of the United States.

October Term 1887.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } No. 664.

SAME
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } No. 660.

SAME
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 661.

SAME
vs.
THE NORTHERN RAILWAY COMPANY. } No. 662.

SAME
vs.
THE CALIFORNIA PACIFIC RAILROAD COMPANY. } No. 663.

SAME
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } No. 1,157.

BRIEF OF THE ATTORNEY-GENERAL OF CALIFORNIA ON BEHALF OF THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE—No. 664.

The plaintiffs in error sued the defendant in error in the Superior Court of the city and county of San Francisco, California, to recover certain sums assessed as taxes for State and county purposes for the year 1885, by the State

Board of Equalization, on defendant's franchises, roadway, road-bed, rails, and rolling-stock in the several counties through which defendant's road passes, specifying in the complaint the amount claimed as State taxes, and the amounts claimed for the several counties for county purposes.

The defendant answered denying the allegations of the complaint, and each and every of them, and by way of a further and separate answer, alleged that it is a corporation existing under the laws of the United States and of the State of California, and as such has been the owner for many years of a line of railroad known as the Central Pacific railroad, extending from the Pacific Ocean across the State of California and the State of Nevada to Ogden, in the Territory of Utah. That the total length of said railroad in the State of California is 640.68 miles. That on the 28th day of June, 1861, a corporation was formed under the laws of said State, by the name of the Central Pacific Railroad Company of California, for the purpose of constructing a line of railroad and telegraph from Sacramento to the eastern boundary of said State, in expectation that it would constitute a part of a line contemplated to be constructed under authority of the United States from the Missouri river to the Pacific Ocean; that Congress, on or about 1st of July, 1862, chartered the "Union Pacific Railroad Company" for the purpose of constructing this line between said points, and, to facilitate the matter, adopted the said Central Pacific Railroad Company of California as the instrument or agent of the United States to construct that portion lying in California, conferring upon it the same powers, privileges, and immunities as upon the Union Pacific Railroad Company, with the intent to secure the completion of a railroad from the Missouri river to the Pacific Ocean, and to secure the use thereof to the Government of the United States for the transportation of its mails, troops, munitions of war, and public stores.

That the said Central Pacific accepted the terms and conditions of said act of Congress. That the line was completed from the Pacific Ocean to Ogden in 1869, and the whole line has been completed and is being operated as a continuous line from the Missouri River to the Pacific Ocean; and the defendant is an agent of the Federal Government in carrying out its purposes as expressed in the acts of Congress. That the Central Pacific Railroad Company of California and the Western Pacific Railroad Company consolidated and became one corporation under the name of the Central Pacific Railroad Company, the defendant herein.

That the United States loaned its bonds to said Central Pacific Railroad Company of California in the sum of $27,000,000; that no part of said loan has been paid, except interest, and that to secure the payment of the same ever since their issuance the United States has had a lien by mortgage, upon defendant's railroad, &c. That the United States further authorized said Central Pacific Railroad Company of California to issue its bonds in an additional amount of $27,000,000, and to secure the payment of the same by a mortgage upon its railroad, &c.; and under said authority bonds, to the amount of more than $5,000 per mile, were issued before January 1, 1875, and the payment of the same was so secured. Said bonds are unpaid and are not yet due. Some are owned by citizens of California, while others are held by residents of States other than California. That to further aid in the construction of its railroad the defendant executed a mortgage on the land grant it received from Congress in aid of said railroad in the sum of $10,000,000, and of the bonds secured thereby there is still due and unpaid the sum of $4,630,000. That the bonds are owned and held in California and in other States than California. That the lands mentioned are agricultural and grazing lands and not connected with the railroad business of defendant.

That they were assessed by the county assessors without any deduction on account of said mortgage. That the defendant paid all the taxes on these lands. That under the Constitution and laws of the State of California in making assessments against property owned by natural persons or corporations, other than railroad or other *quasi*-public corporations, the mortgage is treated as an interest in the property affected thereby and is deducted from the assessment of the mortgaged property, but this is not permitted as to such corporations as defendant.

That on the 15th day of August, 1885, the State Board of Equalization, pretending to act under the Constitution of California, made an assessment for the fiscal year upon the franchise, roadway, road-bed, rails, and rolling-stock of defendant's road, which was not made separately, but the properties were blended together. That this is the assessment upon which the taxes sued for were based, and included all the property mentioned in section 3665 of the Political Code, except depots, stations, shops, and buildings erected upon the space covered by the right of way, which were assessed by the local assessor. That in making said assessment no mortgage was deducted, although the State Board of Equalization had full knowledge of its existence. That under the Constitution of California the county Board of Supervisors constitutes a Board of Equalization for the county, to equalize the valuation of property in the county, except as to the franchise, roadway, &c., of railroads operated in more than one county, and that all other owners of property have the right and privilege of a hearing before said local Board of Equalization except such as defendant. That this is violative of the fourteenth amendment to the Constitution of the United States as not according the equal protection of the laws to the defendant.

That section 10, article 13, of the Constitution of California violates the fourteenth amendment in respect to

due process of law, for the reason that said constitutional provision of the State does not provide for any opportunity for parties to be heard in defense of their rights before the State Board of Equalization.

That the Constitution of the State violates the fourteenth amendment in this, that if the property of a natural person or corporation, not *quasi*-public, has a mortgage thereon, the mortgage for the purposes of taxation is deducted from the assessment of the property, whereas no such deduction is made in the case of the property of railroad and other *quasi*-public corporations; also, in this, that while the Constitution of the State provides the same mode for the assessment of the franchise, roadway, &c., of all railroads operated in more than one county, whether such property be owned by railroad or other *quasi*-public corporations or by private corporations or by natural persons, yet it permits a deduction of the mortgage from the value of the property only when it is owned by natural persons or corporations not *quasi*-public.

That under the Constitution of the State all property except the franchise, roadway, &c., of railroads operated in more than one county is assessed by the local assessor instead of by the State Board of Equalization.

That by the Constitution of the State persons operating railroads in more than one county have been singled out from all other persons operating property in more than one county, and denied the right to appeal from over-valuations by assessors to the local Boards of Equalization.

That corporations in the State of California now are, and ever have been, formed under general laws; and railroad corporations now are, and ever have been, designated by the laws of California as private corporations.

That there are railroads in said State, operated in more than one county, owned by individuals, partnerships, and corporations other than railroad corporations, which under the laws of California are entitled to deductions in making assessments, and have been allowed such deductions.

That under the several acts of Congress defendant became a Federal corporation, and has held its franchise, and exercised all its corporate powers under the Government of the United States; and that if not such a Federal corporation, yet it holds all the corporate powers and franchises granted to it by the several acts of Congress as the trustee of the Federal Government and for governmental uses and purposes.

That the franchise of defendant is not subject to State taxation; the defendant having been selected as the means and instrumentality of the Federal Government to construct the railroad and keep it in repair for certain governmental purposes. That the State Board of Equalization included in the assessment the value of all the franchises and powers held by defendant; that the same is blended with the values affixed to the roadway, road-bed, &c., and the tax upon said franchise is in like manner blended with and cannot be separated from the tax on said roadway, road-bed, &c.

There are also some State questions raised in the answer.

First. In the answer it is alleged that the value of fences on the line of the road, and that of certain steam ferry-boats plying between the western and eastern sides of the Bay of San Francisco for transportation of defendant's cars, were embraced in the assessment in question, but this feature of the case is eliminated, as will hereafter appear.

Second. That the State Board of Equalization made the said assessment upon the franchise, roadway, road-bed, rails, and rolling-stock; that the assessment was not made on them separately, but that they were all blended together.

Third. That the State Board of Equalization assessed railroad property higher in proportion than any other property, thus violating the provision of the State Constitution, which requires that property shall be taxed in pro-

portion to its value; that the valuation was excessive, and was so made willfully and intentionally.

Other matters are averred, but the foregoing presents the material contentions of the defendant in error.

On motion of defendant the case was transferred to the Circuit Court of the United States for the district of California, where a jury was waived and the case submitted to the Court on a stipulation. (Record, p. 35.)

The Court, in substance, made the following Findings of Fact:

(*a*). That the State Board of Equalization assessed the property of defendant, apportioned the same, upon which taxes were levied, as set out in the complaint.

(*b*). That the defendant is a corporation existing under the laws of California, except in so far as its organization, existence, and character may be affected by the Federal or State statutes in the findings referred to.

(*c*). That in making the assessment the franchise, roadway, road-bed, rails, and rolling-stock were blended together, and not separately assessed.

(*d*). That in making the assessment no deduction was made on account of the mortgage indebtedness above referred to.

(*e*). That under the Constitution of California, as to property of natural persons, and of corporations not *quasi*-public, such deductions are provided for and made, but in case of corporations such as the defendant such deductions are not permitted, and were not made in the case of the assessment in question; that the tenth section of article thirteen of the Constitution of the State of California provides the same mode for the assessment of the franchises, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county, whether such property be owned by railroad or other *quasi*-public corporations, or by private corporations, or by natural persons.

(*f*). That under the Constitution of California the owners of property, except such as that of the defendant in this case, have the right to apply to a County Board of Equalization for correction of assessments, and to have a hearing before such Board, but such right is denied in respect to property such as is involved in the assessment in question.

(*g*). That the power conferred by the State Constitution on the State Board of Equalization, to which Board is committed the assessment of property of railroad corporations operating roads in more than one county, does not provide for parties to be heard in defense of their rights.

(*h*). That there are railroads operated in more than one county owned by partnerships, individuals, and corporations other than railroad corporations, and as to which—in making assessments—deductions of mortgage liens are, by the laws of California, authorized to be made and have been made. Also, that by the laws of California private corporations are authorized to be created for any purpose, for which individuals may associate themselves, such as insurance, operating railroads, wagon roads, manufacturing, etc., which under the laws are allowed these deductions, although denied to such corporations as defendant.

(*i*). Also, that the defendant is not indebted to plaintiff in any sum.

On these Finding of Facts, substantially as above, the Court below held the law was with the defendant, and gave judgment accordingly.

Certain provisions of the Constitution and laws of the State of California, bearing upon the questions to be presented to this Court, are as follows:

CONSTITUTION.

Sections 1, 2, 4, 9, and 10, of article 13, of the Constistitution of California, provide as follows:

"Section 1. All property in the State, not exempt under the laws of the United States, shall be taxed in proportion

to its value, to be ascertained as provided by law. The word 'property' as used in this article and section is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership; provided, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or trust-deed, for a deduction from credits of debts due to bona-fide residents of this State.

"Section 2. Land and the improvements thereon shall be separately assessed, &c.

"Section 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroads and other *quasi*-public corporations, in cases of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof; provided, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year.

"Section 9. A State Board of Equalization, consisting of one member from each Congressional district in this State, shall be elected by the qualified electors of their respective districts at the general election to be held in the year one thousand eight hundred and seventy-nine, whose

term of office after those first elected shall be four years, whose duty it shall be to equalize the valuation of the taxable property of the several counties in the State for the purposes of taxation. The Controller of State shall be *ex-officio* a member of this Board. The Boards of Supervisors of the several counties of the State shall constitute Boards of Equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; provided, such State and County Boards of Equalization are hereby authorized and empowered, under such rules of notice as the County Boards may prescribe, as to the county assessments, and under such rules of notice as the State Board may prescribe, as to the action of the State Board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll.

"Section 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and district."

Section 1 of article 12 provides:

"Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

Section 11 of article 1 provides:

"All laws of a general nature shall have a uniform operation."

STATUTORY PROVISIONS.

Sections 3617, 3627, 3628, 3629, 3664, 3665, 3669, 3670, 3671, 3672, 3673, 3674, 3676, 3692, and 3693 of the Political Code of California provide as follows:

Section 3617, third subdivision:

"The term 'improvements,' includes—1. All buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land." [In effect, March 7, 1881.]

"Section 3627. All taxable property must be assessed at its full cash value. Land and improvements thereon shall be separately assessed. Cultivated and uncultivated land, of the same quality and similarly situated, shall be assessed at the same value. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, except as to railroad and other *quasi*-public corporations. In case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situated. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured. If the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and, to the extent of such payment, a full discharge thereof. If any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year; and every contract by which a debtor is obliged to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void. [In effect March 7, 1881.]

"Section 3628. The franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State, shall be assessed by the State Board of Equalization, as hereinafter provided for. Other franchises, if granted by the authorities of a county, city, or city and county, must be assessed in the county, city, or city and county, within which they were granted; if granted by any other authority they must be assessed in the county in which the corporations, firms, or persons owning or holding them have their principal place of business. All other taxable property shall be assessed in the county, city, city and county, town, township, or district in which it is situated. Land shall be assessed in parcels or subdivisions not exceeding six hundred and forty acres each, and tracts of land containing more than six hundred and forty acres, which have been sectionized by the United States Government, shall be assessed by section or fractions of sections. The assessor must, between the first Mondays of March and July in each year, ascertain the names of all taxable inhabitants, and all property in his county subject to taxation, except such as is required to be assessed by the State Board of Equalization, and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was at twelve o'clock M. of the first Monday of March next preceding; but no mistake in the name of the owner, or supposed owner of real property, shall render the assessment thereof invalid. In assessing solvent credits, not secured by mortgage or trust deed, a reduction therefrom shall be made of debts due to *bona-fide* residents of this State. [In effect March 22, 1880.]

"Section 3629. He must exact from each person a statement under oath, setting forth specifically all the real and personal property owned by such person, or in his possession, or under his control, at twelve o'clock M. on the first Monday in March, &c. [In effect March 7, 1881.]

"Section 3664. The president, secretary, or managing agent, or such other officer as the State Board of Equalization may designate, of any corporation, and each person, or association of persons, owning or operating any railroad in more than one county in this State, shall, on or before the first Monday in April of each year, furnish the said Board a statement, signed and sworn to by one of such officers, or by the person or one of the persons form-

ing such association, showing in detail for the year ending on the first Monday in March in each year—

1. The whole number of miles of railway in the State, and, when the line is partly out of the State, the whole number of miles without the State, and the whole number within the State, owned or operated by such corporation, person, or association;

2. The value of the roadway, road-bed, and rails of the whole railway, and the value of the same within the State;

3. The width of the right of way;

4. The number of each kind of all rolling-stock used by such corporation, person, or association in operating the entire railway, including the part without the State;

5. Number, kind, and value of rolling-stock owned and operated in the State;

6. Number, kind, and value of rolling-stock used in the State, but owned by the party making the returns;

7. Number, kind, and value of rolling-stock owned, but used out of the State, either upon divisions of road operated by the party making the returns, or by and upon other railways. Also showing, in detail, for the year preceding the first of January:

1. The gross earnings of the entire road;

2. The gross earnings of the road in the State, and where the railway is let to other operators, how much was derived by the lessor as rental;

3. The cost of operating the entire (road), exclusive of sinking fund, expenses of land department, and money paid to the United States;

4. Net income for such year, and amount of dividend declared;

5. Capital stock authorized;

6. Capital stock paid in;

7. Funded debt;

8. Number of shares authorized;

9. Number of shares of stock issued;

10. Any other facts the State Board of Equalization may require;

II. A description of the road, giving the points of entrance into and the point of exit from each county, with a statement of the number of miles in each county. When a description of the road shall once have been given no other annual description thereafter is necessary unless the

road shall have been changed. Whenever the road, or any portion of the road, is advertised to be sold, or is sold, for taxes, either State or county, no other description is necessary than that given by, and the same is conclusive upon, the corporation, power, or association giving the description. No assessment is invalid on account of a misdescription of the railway or the right of way for the same. If such statement is not furnished, as above provided, the assessment made by the State Board of Equalization upon the property of the corporation, person or association failing to furnish the statement is conclusive and final. [In effect March 9, 1883.]

"Section 3665. The State Board of Equalization must meet at the State Capitol on the first Monday in August, and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the Board must assess the franchise, roadway, road-bed, rails and rolling-stock of all railroads operated in more than one county. Assessment must be made to the corporation, person, or association of persons owning the same, and must be made upon the entire railway within the State, and must include the right of way, bridges, culverts, wharves, and moles upon which the track is laid, and all steamers which are engaged in transporting passenger and freight cars across waters which divide the road. The depots, stations, shops, and buildings erected upon the space covered by the right of way are assessed by the assessor of the county wherein they are situate. Within ten days after the third Monday of August the Board must apportion the total assessment of the franchise, roadway, road-bed, rails, and rolling-stock of each railway to the counties, or cities and counties, in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and counties. The Board must also, within said time, transmit by mail, to the county auditor of each county, or city and county, to which such apportionment shall have been made, a statement, showing the length of the main track of such railway within the county, or city and county, with a description of the whole of the said track within the county, or city and county, including the right of way, by metes and bounds, or other description sufficient for identification, the assessed value per mile of the same, as fixed by a *pro rata* distribution per

mile of the assessed value of the whole franchise, roadway road-bed, rails, and rolling-stock of such railway within the State, and the amount apportioned to the county, or city and county. The auditor must enter the statement on the assessment-roll or book of the county, city and county, and where the county is divided into assessoral townships or districts, then on the roll or book of any township or district he may select, and enter the amount of the assessment apportioned to the county, or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation, either of the county, city and county, or such township or district. On the first Monday in October the Board of Supervisors must make, and cause to be entered in the proper record book, an order, stating and declaring the length of main track of the railway assessed by the State Board of Equalization within the county, the assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school and road districts, or lesser taxing districts in the county, or city and county, through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the assessed value of said property for taxable purposes in such city, town, township, school, road, or other district, and the clerk of the Board of Supervisors must transmit a copy of each order or equalization to the city council or trustees, or other legislative body of incorporated cities or towns, the trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes as the property of individuals within such city, town, township, school, road, and lesser taxation districts, respectively. If the owner of a railway assessed by the State Board of Equalization is dissatisfied with the assessment made by the Board, such owner may, at the meeting of the Board, under the provisions of section thirty-six hundred and ninety-two of the Political Code, between the third Monday in August and the third Monday in September, apply to the Board to have the same corrected in any particular, and the Board may correct and increase or lower the assessment made by

it, so as to equalize the same with the assessment of other property in the State. If the Board shall increase or lower any assessment previously made by it, it must make a statement to the county auditor of the county affected by the change in the assessment of the change made, and the auditor must note such change upon the assessment-book or roll of the county, as directed by the Board. [In effect March 9, 1883.]

"Section 3669. Each corporation, person, or association assessed by the State Board of Equalization, must pay to the State Treasurer, upon the order of the Controller, as other moneys are required to be paid into the treasury, the State and county, and city and county, taxes each year levied upon the property so assessed to it or him by said Board. Any corporation, person, or association, dissatisfied with the assessment made by the Board, upon the payment of the taxes due upon the assessment complained of, and the five per cent. added, if to be added on or before the first Monday in February, and the filing of notice with the Controller of an intention to begin an action, may, not later than the first Monday in February, bring an action against the State Treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied in whole or in part. A copy of the complaint and of the summons must be served upon the treasurer within ten days after the complaint has been filed, and the treasurer has thirty days within which to demur or answer. At the time the treasurer demurs or answers, he may demand that the action be tried in the Superior Court of the county of Sacramento. The attorney-general must defend the action. The provisions of the code of civil procedure relating to pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for. If the final judgment be against the treasurer, upon presentation of a certified copy of such judgment to the controller he shall draw his warrant upon the State treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected, and the cost of such action, audited by the Board of Examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated;

and the controller may demand and receive from the county, or city and county, interested, the proportion of such costs, or may deduct such proportion from any money then, or to become, due said county, or city and county. Such action must be begun on or before the first Monday in February of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action. [In effect March 9, 1883.]

"Section 3670. After the first Monday of February of each year, the controller must begin an action in the proper Court, in the name of the people of the State of California, to collect the delinquent taxes upon the property assessed by the State Board of Equalization; such suit must be for the taxes due the State, and all the counties, and cities and counties, upon property assessed by the Board of Equalization, and appearing delinquent upon the 'Duplicate Report of Apportionment of Railway Assessments.' The demands for State and county and city and county taxes may be united in one action. In such action a complaint in the following form is sufficient:

(Title of Court.)

The People of the State of California }
vs.
(Naming the Defendant.) }

Plaintiff avers that on the — day of — in the year (naming the year), the State Board of Equalization assessed the franchise, roadway, road-bed, rails, and rolling-stock of the defendant at the sum of (naming it) dollars. That the Board apportioned the said assessment as follows: To the county of (naming it) the sum of (naming it) dollars (and so on, naming each county).

That the defendant is indebted to plaintiff for State and county taxes for the year eighteen — in the following sums: For State taxes, in the sum of (naming it) dollars, for county taxes of the county of (naming it), in the sum of (naming it) dollars, &c., with five per cent. added for non-payment of taxes. Plaintiff demands payment for said several sums, and prays that an attachment may issue in form as presented in section five hundred and forty of the Code of Civil Procedure.

(Signed by the Controller or his attorney.)

On the filing of such complaint the clerk must issue the writ of attachment prayed for, and such proceedings shall be had as under writs of attachment issued in civil actions; no bond nor affidavit previous to the issuing of the attachment is required. If on such action the plaintiff recover judgment there shall be included in the judgment as counsel fees, and in case of judgment of taxes, after suit brought but before judgment, the defendant must pay as counsel fees such sums as the Court may determine to be reasonable and just. Payment of the taxes on the amount of the judgment in the case must be made to the State treasurer. In such actions the duplicate record of assessments of railways and the duplicate record of apportionment of railway assessments, or a copy of them, certified by the controller, showing unpaid taxes against any corporation, person, or association for property assessed by the State Board of Equalization, is *prima facia* evidence of the assessment, the property assessed, the delinquency, the amount of the taxes due and unpaid to the State, and counties, or cities and counties, therein named, and that the corporation, person, or association is indebted to the people of the State of California, in the amount of taxes, State and county, and city and county, therein appearing unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. [In effect March 9, 1883.]

"Section 3671. The assessment made by the county assessor, and that of the State Board of Equalization, as apportioned by the Board of Supervisors to each city, town, township, school, road, or other district in their respective counties, shall be the only basis for taxation for the county, or any subdivision thereof, except in incorporated cities and towns, and may also be taken as such basis in incorporated cities and towns when the proper authorities may so elect. All taxes upon townships, road, school, or other local districts shall be collected in the same manner as county taxes. [In effect March 9, 1883.]

"Section 3672. The Board of Supervisors of each county must meet on the first Monday of July in each year to examine the assessment book and equalize the assessment of property in the county. It must continue in session for that purpose from time to time until the business of equalization is disposed of, but not later than the fourth Monday in July. [In effect January 1, 1873.]

"Section 3673. The Board has power, after giving notice in such manner as it may, by rule, prescribe, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said roll, and make the assessment conform to the true value of such property in money. [In effect March 22, 1880.]

"Section 3674. No reduction must be made in the valuation of property, unless the party affected thereby, or his agent, makes and files with the Board a written application therefor, verified by his oath, showing the facts upon which it is claimed such reduction should be made. [In effect January 1, 1873.]

"Section 3676. Upon the hearing of the application the Board may subpœna such witnesses, hear and take such evidence in relation to the subject pending, as in its discretion it may deem proper. [In effect January 1, 1873.]

"Section 3692. The powers and duties of the State Board of Equalization are as follows:

1. To prescribe rules for its own government, and for the transaction of its business.

2. To prescribe rules and regulations, not in conflict with the Constitution and laws of the State, to govern supervisors when equalizing, and assessors when assessing.

3. To make out, prepare, and enforce the use of forms in relation to the assessment of property.

4. To hold regular meetings at the State Capitol on the second Monday in each month, and such special meetings as the chairman may direct.

5. To annually assess the franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State, at their actual value, on the first Monday in March, at 12 o'clock M., and to apportion such assessment to the counties, and cities and counties, in which such roads are located in proportion to the number of miles of railway laid in such counties, and cities and counties, in the manner provided for in section 3664 of said code.

6. To equalize the assessment of each mortgage, deed of trust, contract, or other obligation by which a debt is secured, and which affects property situate in two or more counties, and to apportion the assessment thereof to each of said counties.

7. To transmit to the assessor of each county, or city and county, its apportionment of the assessments made by said Board upon the franchises, roadways, road-beds, rails, and rolling-stock of railroads; and also its apportionment of the assessment made by such Board upon mortgages, deeds of trust, contracts, and other obligations by which debts are secured, in the manner provided for in section 3664 of said code.

8. To meet at the State Capitol on the third Monday in August, and remain in session from day to day (Sundays excepted) until the third Monday in September.

9. At such meeting to equalize the valuation of the taxable properties of the several counties in this State for the purpose of taxation; and to that end, under such rules of notice to the clerk of the Board of Supervisors of the county affected thereby as it may prescribe, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said roll, and make the assessment conform to the true value in money of the property assessed, and to fix the rate of State taxation, and to do the things provided in section 3693 of said code.

10. To visit as a Board, or by the individual members thereof, whenever deemed necessary, the several counties of the State, for the purpose of inspecting the property and learning the value thereof.

11. To call before it, or any member thereof, on such visit, any officers of the county, and to require them to produce any public records in their custody.

12. To issue subpœnas for the attendance of witnesses or the production of books before the Board, or any member thereof, which subpœnas must be signed by a member of the Board, and may be served by any person.

14. To appoint a clerk, prescribe and enforce his duties. The clerk shall hold his office during the pleasure of the Board.

15. To report to the Governor, annually, a statement showing:

First. The acreage of each county in the State that is assessed.

Second. The amount assessed per acre.

Third. The aggregate value of all town and city lots.

Fourth. The aggregate value of all real estate in the State.

Fifth. The kinds of personal property in each county, and the value of each kind.

Sixth. The aggregate value of all personal property in the State.

Seventh. Any information relative to the assessment of property and the collection of revenue.

Eighth. Such further suggestions as it shall deem proper.

16. To keep a record of all its proceedings. [In effect April 3, 1880.]

Section 3693. When, after a general investigation by the Board, the property is found to be assessed above or below its full cash value, the Board may, without notice, so determine, and must add to or deduct from the valuation:

1. The real estate.

2. Improvements upon such real estate.

3. The personal property, except money, such per centum respectively as is sufficient to raise or reduce to its full cash value." [In effect April 3, 1880.]

ASSIGNMENT OF ERRORS.

Come now the people of the State of California and say that in the said record and proceedings there is manifest error in this, to wit: That by the record aforesaid it appears that said judgment was given for said defendant and against said plaintiff, whereas it ought to have been given for the said plaintiff and against said defendant.

That the said Circuit Court erred in deciding that in the assessment of the property in question the said defendant in error was denied the equal protection of the laws.

That the said Circuit Court erred in deciding that in the making of said assessment the said defendant in error was deprived of its property without due process of law.

That the said Circuit Court erred in deciding that said defendant did not have due notice of the said assessment.

That the said Circuit Court erred in deciding that said defendant did not have an opportunity to be heard in the

matter of the assessment of its property before the said State Board of Equalization before said assessment became final.

That the said Circuit Court erred in deciding that said State denied to said defendant the equal protection of the laws.

That the said Circuit Court erred in deciding that said State deprived said defendant of its property without due process of law.

That the said Circuit Court erred in deciding that said assessment or said tax was for any reason illegal or invalid.

That the Court erred in rendering judgment on the findings for defendant, and that plaintiff was and is entitled to judgment on the findings of the Court.

Plaintiff prays that said judgment be reversed, and that judgment be ordered to be rendered and entered for the plaintiff.

Under the following provisions of the Constitution and Codes of California, the assessment in question was levied.

This case was decided by the Court below on the Federal questions involved. But, as it may be claimed that where two or more grounds of defense are shown by the record, and one or more is based on Federal law and the others on State law, and the record does not show on which ground the Court below based its decision, in that case the Court here will presume that the decision was based on the State law, provided that could vindicate the decision below, I will argue, first, the several so-called State questions raised by the answer in the order hereinbefore named.

Brief.

First. In the answer it is alleged that the value of fences on the line of the road, and that of certain steam ferry-boats plying between the western and eastern sides of the Bay of San Francisco for the transportation of defendant's cars, were embraced in the assessment in question.

The findings negative this idea. Finding 21, Record, p. 41:

"Said assessment included all property and kinds of property mentioned in section 3665 of the Political Code of California, as amended March 9, 1883, except depots stations, shops, and buildings erected upon the space covered by the right of way, which last-mentioned property was assessed, as provided in said section, by local assessors, and except steamboats."

With this express exception of steamboats, it certainly cannot be maintained that the steamers were assessed. Nor can it be maintained that the distance across the Bay of San Francisco, to wit, five miles, was assessed as a part of defendant's road. The answer avers, and the findings find, that the total length of said railroad in the State of California is 640.68 miles, and the length of it in the several counties is given, making up this aggregate. (Finding 14, Record, p. 38.) It nowhere appears that any part of the road was in the Bay of San Francisco. Nor can it be contended that the fences entered as a constituent in the assessment of the road. If a fence is a building, and we claim it is, then it appears that the buildings (fences) erected upon the space covered by the right of way were assessed by the local assessor, and not by the State Board of Equalization.

That the fences were not assessed by the State Board is apparent from the stipulation on page 35 of the Record, where, after providing that certain testimony in other cases should be treated as given in this case, it is added, "except the testimony relating to the taxation of fences, which, for

the purposes of this case and by the consent of the defendant, is omitted."

It must be borne in mind also, that the word "fences" does not occur in section 3665 of the Political Code at all.

In the Santa Clara Case, decided by this Court in 1886, there was an express finding that the fences were assessed by the State Board of Equalization:

"The State Board of Equalization, in making the supposed assessment of said roadway of defendant, did, knowingly and designedly, include in the valuation of said roadway the value of the fences erected upon the line between said roadway and the land of coterminous proprietors." (6 Supreme Court Reporter, p. 1139.)

Here it may be added, that in the case of City and County of San Francisco *v.* The Central Pacific Railroad Company, 63 Cal., 467, the Supreme Court of California says "that the assessment of steamers pertained to the local assessor," under the provisions of the State Constitution; consequently, so much of section 3665 of the Political Code as requires the State Board of Equalization to assess them, is null and void. It is clear, therefore, that in respect to fences, steamers, and the distance across the Bay of San Francisco, in connection with the assessment of defendant's road, no material question is presented for the consideration of this Court.

Second State question presented by the answer: That the State Board of Equalization made the said assessment upon the franchise, roadway, road-bed, rails, and rolling-stock; that the assessment was not made on them separately, but that they were all blended together.

This may seem to present a Federal question, but hereafter I shall discuss the question whether or not such a franchise as the defendant has from the Federal Government is taxable by the State, as presenting a Federal question. Assuming for the present, however, that the State

may tax such a franchise, then the question whether it should be assessed separately, or in connection with the roadway, road-bed, rails, and rolling-stock, may be claimed to be a State question, if assessed as an entirety, on the ground that the Constitution of the State says that all property shall be taxed in proportion to its value, to be ascertained as provided by law. It is clear from the language of the Constitution that its object was to ascertain the value of the railroad as an entirety. (Sec. 10, Art. 13.) We claim further that if the different constituents of the railroad were assessed separately, it would be violative of section 1 article 13 of the Constitution of the State, which says that all property shall be taxed in proportion to its value.

In the case of *The Union Pacific Railway Company* v. *Cheyenne*, 113 U. S., p. 517, Mr. Justice Bradley says:

"A railroad cannot be regarded as mere land, like farm land or building lots; its value depends upon the whole line as a unit, to be used as a thoroughfare and means of transportation. A separate mile or two of its length is almost valueless by itself. And then its rolling-stock has no particular locality, except a constructive one, in the place where the principal office of the railroad company is situated, and it would be manifestly unequal to give to that place the benefit of taxing the whole of it. The plan adopted by the statute avoids these difficulties. It places the power of assessing the value of the whole line (so far as it lies within the territory), including the rolling-stock, in the hands of the Board of Equalization, and after they have fixed such valuation, and ascertained what it amounts to per mile for the whole length within the territory, such valuation per mile is certified by the territorial auditor to the clerks of the several counties through which the road passes, so as to give each its *pro rata* share."

In the case of *County of San Mateo* v. *The Southern Pacific Railroad Company*, Vol. 13, Federal Reporter, p. 725, Judge Sawyer says:

"Nor do we think" (alluding, I presume, to the learned Circuit Justice and himself) "that the assessment of the

franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in the State by the State Board of Equalization as a unit, and apportioning that amount of assessed value to the several counties in proportion to the number of miles in each, is objectionable on the ground that it denies the equal protection of the laws to the owner of the road. Indeed, this seems to be the only practicable way of assessing a railroad. It is owned and treated as a unit, and can't be otherwise usefully employed. Its income, expenses, and management, and all its operations are as a unit. Its rolling-stock is at one point at one moment, and at another at a different point of time, but it is all working together as a unit to the accomplishment of one end. In fragments and isolated parts, the road would be comparatively valueless as property. It is only as a unit that it can properly be considered, or properly taxed. To tax it otherwise, would be to tax it upon principles materially different from those applicable to other property necessarily considered and used as a unit. The character and circumstances of the property are such as seem to justify a classification for this purpose."

If, as the learned judge says, railroad property should be assessed as a unit, the query arises, how could a mortgage be deducted?

In *Porter et al.* v. *R. R. I. & St. L. R. R. Co.*, 76 Ill., p. 584, the Supreme Court of Illinois says:

"Local improvements may, indeed, vary, and they are required to be assessed by the local assessors; but the road and its equipment constitute a single, entire property. In determining the value of such property, the question is neither one of original cost, nor of the intrinsic value of the various items of which the road and its equipments are composed, taken separately, but what is it worth with all its capabilities and facilities as a railroad? The franchise extends to the entire corporate property, and it is not possible that it can be divided. It must, if assessed at all, be assessed as an entirety, and this, as we have already shown, may be in connection with the property to which it is attached."

In the State Railroad Tax Cases, 92 U. S., p. 608, the Court says:

"It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole."

And, again, on page 611, the Court says:

"But the contention is, that the rule of treating the road, its rolling-stock, and franchises, as a unit, and assessing it as a whole, on which each municipality levies its taxes according to the length of the road within its limits, violates the principles of this section. We have already discussed this question, and are of the opinion that taxes assessed by that rule on the railroad property by the municipality are uniform when the rate of taxation is the same on the assessment thus ascertained that it is on other property."

The section referred to is a section in the Illinois Constitution in respect to taxing in proportion to the value of the property.

And, again, in the course of the decision, the Court says:

"But, as we have already said, a railroad must be regarded for many, indeed, for most purposes, as a unit. The track of the road is but one track from one end of it to the other, and except in its use as one track is of little value."

Desty on Taxation, Vol. 1, pp. 392 and 393.

Cincinnati, &c., Railway Co. v. *Commonwealth*, 81 Ky., 492.

It is clear from these authorities, and from the reason of the thing, that the unitary assessment is the only practicable one that can be made in respect to railroads.

Third. That the State Board of Equalization assessed railroad property higher in proportion than any other prop-

erty, violating the provision of the State Constitution which requires that property shall be taxed in proportion to its value; that the valuation was excessive, and was made carefully and intentionally. This is the third State question.

The State Board of Equalization has jurisdiction under the Constitution of the valuation of defendant's property, and are the exclusive judges thereof. If they err in their judgment, there is no revisory power given to the Federal Courts. Presumptions of willful disregard of official duty are not to be indulged. There is no finding in this case that any fraudulent, corrupt, or willfully false assessment has been made. It has been frequently decided that the Federal Courts cannot review and correct the errors and mistakes of the State tribunals on this subject. Here we quote again from Porter *et al. v.* R. R. I. & St. L. R. R. Co., 76 Ill., p. 595, relating to this particular point:

"But it does not devolve upon us to justify the accuracy of the assessment as made. In the view we have taken of the case, the Board of Equalization assessed the value of the capital stock, including the franchise, over and above the assessed value of the tangible property; and did not assess the shares of stock belonging to the shareholders or debts of the corporation. The property assessed was the property of the corporation, upon which it was liable to be assessed for the payment of taxes. The Constitution, as has been seen, requires that the value of property assessed for taxation shall be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise. The General Assembly has directed that the Board of Equalization and not the courts shall exercise this function. However much, therefore, we may think the Board erred in its valuation, no power is given to us to arrest the collection of the tax merely on that account. The Board was fully empowered by law to make this particular assessment, and had jurisdiction over the property and the corporation for that purpose. The law is well settled that assessors, in judging of the value of property, act judicially," &c.

In the case of *Pacific Hotel* v. *Lieb et al.*, 83 Ill., p. 606, the Supreme Court of that State says:

"The State Board of Equalization, in assessing this class of property, does not act as a board of review, as it does with respect to other kinds of property, but as an original assessor. The law makes it its duty, not to assess the capital stock of corporations whereof returns shall be laid before it by the auditor, but its language is: 'The capital stock of all companies and associations, now or hereafter created under the laws of this State, shall be so valued by the State Board of Equalization as to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association. And to that end it is empowered to 'adopt such rules and principles for ascertaining the fair cash value of such capital stock as to it may seem equitable and just.' Jurisdiction to make the valuation is therefore conferred in all cases where the company or association is created under the laws of the State, and, in making it, the Board is to be governed by 'such rules and principles as to it may seem to be equitable and just,' instead of being restricted to valuations returned by the local assessors, and laid before it by the auditor. The local assessor is not required to fix any valuation, and the matters to be returned by him are merely such as the law presumes to be important in enabling the Board of Equalization to discharge it duty intelligibly. Manifestly such returns might, if deemed fraudulent or untrustworthy, be entirely disregarded, and the valuations be made from other sources of information supposed to be more accurate and reliable, for, otherwise, it is impossible the Board can, in all cases, act with that freedom in determining what is 'equitable and just' contemplated by the statute. In our opinion, neither the neglect of the local assessor nor that of the corporation, nor both, can excuse the Board of Equalization from its duty to value the capital stock of all companies and associations created under the laws of the State, provided it can otherwise get satisfactory information for that purpose; and of this, from the nature of its organization, it must, necessarily, be the judge. Presumptions of incompetency and of willful dereliction in the discharge of official duty, are no

more to be indulged against members of a Board of Equalization than against local assessors, and whether there should, as a matter of policy, be many or few checks upon their conduct, is not a question for the Courts, since no constitutional mandate is violated in making them the exclusive judges of the value of any or all property, for purposes of taxation."

In the case of *Kirtland* v. *Hotchkiss*, 100 U. S., p. 498, the Supreme Court says, speaking through Mr. Justice Harlan:

"It may, therefore, be regarded as the established doctrine of this Court, that so long as the State, by its laws, prescribing the mode and subjects of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized or secured by the Constitution of the United States, this Court, as between the State and its citizen, can afford him no relief against State taxation, however unjust, oppressive, or onerous."

In the case of Kelly *v.* Pittsburgh, 104 U. S., p. 79, the Court, in the course of the opinion, says:

"It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the State tribunals, that it is only necessary to refer to those decisions without a re-statement of the argument on which they rest. State Railroad Tax Cases, 92 U. S., 575; Kennard *v.* Louisiana, *id.*, 480; Davidson *v.* New Orleans, 96 *id.*, 97; Kirtland *v.* Hotchkiss, 100 *id.*, 491; Missouri *v.* Lewis, 101 *id.*, 22; National Bank *v.* Kimball, 103 *id.*, 732."

We now approach the discussion of the Federal questions involved, which were the questions upon which judgment in the Court below went for the defendant:

First Federal Question. That the United States loaned its bonds to the defendant in the sum of $27,000,000. That no part of said loan has been paid, except interest. That to

secure the payment of the same ever since their issuance, the United States have a lien by mortgage upon said railroad, &c. That the United States further authorized said Central Pacific Railroad Company of California to issue its bonds in the same amount, and to secure the payment of the same by a mortgage upon said road, &c. That the bonds were issued and the payment so secured, but the same are unpaid and not yet due. That to further aid in the construction of its railroad, the defendant executed a mortgage on the land grant it received from Congress in aid of said road in the sum of $10,000,000, and of the bonds secured thereby there is still due and unpaid the sum of $4,630,000. That these lands are agricultural and grazing lands. That they were so assessed by the county assessors, without any deduction on account of said mortgage. That the defendant paid all the taxes on these lands. That under the Constitution and laws of the State of California in making assessments against property owned by natural persons or corporations other than railroad or other *quasi*-public corporations, the mortgage is treated as an interest in the property affected, and is deducted from the assessment of the mortgaged property; but such deduction is not permitted as to property owned by railroad corporations operating roads in more than one county. That by reason of this discrimination, it is claimed the Constitution of California is violative of the Fourteenth Amendment of the Constitution of the United States, and the assessment is null and void.

Second Federal Question. A classification of railroad property for the purposes of assessment and taxation, by which an unjust discrimination in various ways is claimed by the defendant in respect to corporations operating their roads in more than one county, as compared with other corporations and natural persons, resulting, as the defendant claims, in a violation of the fourteenth amendment. This second Federal question may be discussed in connec-

tion with the first, both really involving the power of the State to classify and apportion property for taxation. This brings up the whole subject of the equal protection of the laws.

THE EQUAL PROTECTION OF THE LAWS.

But, if the defendant is not damaged by the provision in section 4, article 13, of the Constitution of California, in respect to not deducting its mortgages from its assessment, it cannot complain of being denied the equal protection of the laws on that account.

This section has been construed by the Supreme Court of California. In the case of *Central Pacific Railroad* v. *State Board* (60 Cal., p. 59) that Court says:

"Reading the whole section, it seems very plain that as to mortgages, deeds of trust, contracts, or other obligations secured upon the property of railroad and other *quasi*-public corporations, they should not be deemed and treated as an interest in the property affected by them, 'for the purpose of taxation.' "

As this is a decision of the Supreme Court of that State upon the question of the meaning of its own Constitution, I apprehend it is binding in this forum.

See opinion of the Court, delivered by Mr. Justice Gray, in the case of *Post* v. *Supervisors*, 105 U. S., p. 669.

It appears, then, that prior to the adoption of the Constitution of 1879, in which the foregoing section is found, the defendant had made divers mortgages. As the law then stood, the defendant had to pay the taxes on this mortgaged property. There was no such thing known as a tax on a mortgage. At that time a mortgage had not been made an interest in the property affected thereby for the purposes of taxation.

Before the Constitution of 1879, therefore, there was no tax to be paid by the mortgagee. We presume that it will not be denied that the effect of the mortgage given by de-

fendant (set forth in Exhibit "A," Rec., p. 21) is that the defendant should pay the taxes on the property mortgaged. The Constitution of 1879 could not change this contract so as to make the mortgagee pay on his mortgage interest without impairing the obligation of such a contract.

In the case of *Beckman* v. *Skaggs*, 59 Cal., 541, the mortgage sought to be foreclosed was executed before the adoption of the present Constitution, as in this case. The Court says:

"In the year 1880, the mortgage, for the purpose of taxation, was an interest in the land, the tax upon which defendant had agreed to pay. The covenant was that the defendant should pay the tax upon the full value of the land. Under the present Constitution he is assessed only for the value of the land, less the amount of the mortgage debt. The agreement to pay the whole tax was valid when made, and so to construe the provision of the Constitution as that the agreement may not be enforced according to its terms, would be to impair the obligation of a contract."

How, then, is the defendant damaged, by reason of the fact that the property and the security are not segregated into distinct interests, when, if the segregation was made, the defendant would still have to pay the whole tax? And if the present Constitution of the State compelled the mortgagee to pay any portion of it, it would be in violation of the Constitution of the United States. The defendant can hardly invoke the aid of the fourteenth amendment, and claim that it does not receive the equal protection of the laws, when it simply pays what the contract calls for. If it paid less it would violate its contract; and if it were authorized, under the State Constitution, to pay less, it would be in violation of the very instrument whose aid it invokes. It sustains no injury to any of its substantial rights; and for this Court to interfere, the defendant must show that it has sustained injury. A hypothetical case will not do. A party does not come into Court on hypothetical cases. His contention must be based on actual facts, which entitle

him to relief. If the State Constitution, therefore, cannot alter his contract, the Constitution cannot be said to be unjustly discriminatory against him, because it does not seek to do what, if it did do, would be in violation of the Federal Constitution. If, under the contract, the defendant would not be compelled to pay the taxes on the mortgaged property, the defendant has failed to show it, and the Court will not presume that such is the case, when it is purely a matter of allegation and proof.

If the fact that a denial to the defendant of a deduction from its assessment of its mortgages by the Constitution of California is a denial of the equal protection of the laws, then on what principle can exemptions of property, entire in certain cases, as found recognized in so many State Constitutions, be sustained? Are not the non-exempted in those cases denied the equal protection of the laws, and burdened with more than an equal share of taxation? To hold in the affirmative must be to subvert almost every revenue system in the different States of the Union.

The defendant must not only show a mortgage, but that it has sustained an injury by not having it deducted from the assessed value of the property for the purpose of taxation. The case of *Supervisors* v. *Stanley*, 105 U. S., p. 305, is decisive of this question.

In the case of Stanley *v.* Supervisors of Albany, 121 U. S., page 545, the case in 105 U. S., to which reference is made just above, was cited with approval, and Mr. Justice Field, in delivering the opinion of the Court, states what was decided in that case. He says:

"After full consideration we held substantially this: That the statute of New York was in conflict with the act of Congress, so far as it did not permit a stockholder of a national bank to deduct the amount of his just debts from the assessed value of his stock, while by the laws of the State the owner of all other personal taxable property was allowed to deduct such debts from its value; but that neither the statute nor the assessment under it was for that

reason void. If the stockholder had no debts, the mode of assessment adopted was not invalid as to him; he could not complain of it, nor recover the taxes paid pursuant to it. If he had debts, the assessment without a deduction for them in the estimate of the taxable value of the stock, was only voidable. The assessing officers, in making the assessment, were acting within their authority until duly notified of the debts which were to be deducted. In such case, therefore, the duty devolved upon the stockholder to show to the assessing officers what his debts were, and to take such steps as were required by the law to obtain a correction of the over-assessment."

Suppose the State Board did have full knowledge of the existence of the mortgage (Finding 22, Record, p. 42), there is nothing to show that they knew the mortgage was not paid off, or that the mortgage was a *bona-fide* one; and if they had full knowledge of the existence of the mortgage, they must have had full knowledge of all that was in it, and that it was the duty of the defendant to pay the taxes on the debt secured thereby. (Memphis, &c., Railroad *v.* Dow, 120 U. S., p. 301.)

Why didn't defendant go before the State Board of Equalization when it sat to equalize any assessment contained in the assessment roll, and show such facts as it claims existed entitling it to this deduction? (Sec. 9, Art. 13.) Although the power conferred upon the State Board by section 10 of said article in the matter of assessment is self-executing, yet when it comes to the equalization of the assessment under section 9 of the same article, the State Board may prescribe rules of notice, and there is nothing in the findings in this case to show that they did not prescribe rules of notice. The presumption of law is, that an officer does his duty. But against this contention it will be claimed that the Supreme Court of California in the case of San Francisco and North Pacific Railroad Company *v.* State Board of Equalization, 60 Cal., page 12, has decided that the equalization authorized by the Constitution to be made by the State Board is only as between counties.

But this cannot be, for the Court, on page 31, says:

"But the Constitution imposes the duty of assessing the property of the corporations upon the State Board of Equalization. The provision of the code ought not to be construed, and cannot fairly be construed, to make each railroad corporation the assessor of its own property, in case it chooses to file a statement. Doubtless the Board will place much reliance upon the statements, and will start with a presumption that they are correct; but if satisfied that property has been omitted from them by mistake, or that the valuation in them contained is too low, must perform its duty of assessing all of the property at its 'actual value.' If the statement is not furnished, the valuation of the Board becomes 'final and conclusive.' This is to be read in connection with the clause in the same section: 'Any person dissatisfied with an assessment made by said Board of Equalization against his or its property may, within five days after such assessment is made and entered of record on the books of said Board, by written petition, apply to said Board to have the same corrected in any particular.' Where no 'sworn statement' is filed, the corporation is cut off from its right of appeal to the Board within five days to have its first assessment corrected. And since it is only where a statement has been prescribed that the application can be made to have the assessment corrected, the assessment made by the Board, after the statement is furnished, is the one which may be corrected. It was certainly not the purpose of the statute to allow the corporation to complain of and have corrected its own sworn statement. The foregoing, of course, is (as are the points of petitioner) based upon the assumption that the section of the Code is valid."

Again, on page 34, the Court says:

"It is true that by section 3664 the assessment of railroad property must be made (as in the case before us it was, in fact, made) on or before the first Monday of May. It is also true that, by the same section, the Board must meet on or before the third Monday of August to equalize the valuation of property as between the several counties. But a reconsideration of the assessment (or equalization) of railroad property can only be made by the State Board in

case a petition shall be filed by a party interested within five days after the assessment is made and entered."

Since that decision was rendered section 3664 has been amended, and all in reference to the five days is eliminated, but the next section (3665) provides, in lieu:

"If the owner of a railway assessed by the State Board of Equalization is dissatisfied with the assessment made by the Board, such owner may, at the meeting of the Board, under the provision of section thirty-six hundred and ninety-two of the Political Code, between the third Monday in August and the third Monday in September, apply to the Board to have the same corrected in any particular, and the Board may correct," &c.

The view here taken must be certainly correct, as, under the Constitution, the State Board of Equalization is the original assessing board of the franchise, roadway, roadbed, rails, and rolling-stock of all railroads operated in more than one county, and under the same instrument the members of the Board are empowered, under such rules of notice as they may prescribe, to act as an Equalizing Board, the Constitution providing, further, that the Board of Supervisors of the several counties shall constitute Boards of Equalization for their respective counties.

The defendant did not avail itself, therefore, of its rights and privileges to go before the State Board of Equalization with the view to the correction of its assessment. The only inference that can be drawn from such non-action is, that the defendant was satisfied with its assessment. It ought to have appeared before the Board. It is too late now to complain. In the case of Stanley *v.* Supervisors of Albany, 121 U. S., p. 550, the Court says:

"To these Boards of Revision, (referring to Boards of Equalization) by whatever name they may be called, the citizens must apply for relief against excessive and irregular taxation, where the assessing officers have jurisdiction to assess the property. Their action is judicial in its character.

They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgment in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on said assessment cannot be recovered back in an action at law, any more than money collected on an erroneous judgment of a Court of competent jurisdiction before it is reversed."

The defendant is not damaged in another aspect of this case. Under the provisions of the Constitution of California, where a mortgage is allowed to be deducted, two interests in real estate are recognized instead of only one, as under its first Constitution. Under this new regime, however, the assessment roll will show the same amount of taxable property. Certain property, the mortgaged property and the mortgage, is simply apportioned between two or more persons. The process should be called an apportionment, in respect to which the power of the State has always been supreme—not a deduction—and no unfair discrimination is suggested by this method. The result of the provision in the Constitution is not to increase the amount of taxation that would otherwise be imposed upon railroad corporations. If other persons, natural or corporate, who are assessed for the two interests, would have to pay less than formerly, thus necessitating the laying of a greater burden upon such corporations as defendant, the argument of defendant's counsel would have greater strength. But this is not so. The differentiation does not change the amount of the assessment roll.

The exception was made in the differentiation in respect to railroad and other *quasi*-public corporations. It was unavoidable. The convention would have made their mortgages an interest in real estate, also, for the purpose of assessment and taxation, if it had been feasible to do

so. These mortgages, however, covered lands within and without the State, lands earned and unearned, patented and unpatented, a continuous railway track from California to Utah Territory, with the franchises, roadway, road-bed, and rolling-stock, with side tracks, depots, and stations. The holders of the mortgage bonds were scattered all over the country. The difference between this kind of property and a farm situated in one county, where a mortgage is recorded against it in the recorder's office, is palpably clear. In the first place, no county assessor could pretend to assess the property and deduct such mortgages with anything like approximative correctness; the constitutional mandate that property shall be taxed in proportion to its value, could not be carried out for the simple reason that its value could not be arrived at in this way. The only alternative was to assess the property as a unit.

Even in respect to natural persons, article 13 of the Constitution says: "The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security it shall constitute a payment thereon," &c. It could not constitute a payment thereon, if the mortgage executed by the defendant before the adoption of the present Constitution says in effect that defendant shall pay the tax thereon; and if it does not say so, still the defendant took its corporate character under the first Constitution, and by so doing submitted itself to the reserved power therein.

In the case, No 661, in this Court there is this provision in the mortgage in respect to the payment of taxes:

"And the said party of the first part hereby agrees and covenants to and with the said party of the second part and their successors in said trust, that it will pay all ordinary and extraordinary taxes, assessments, and other pub-

lic burdens and charges which shall or may be imposed upon the parties herein described and hereby mortgaged, and every part thereof," etc.

Again, as far as the payment of the taxes on defendant's grazing lands is concerned, it is impossible to see how such a payment becomes an efficient factor in the pending cases. Defendant cannot take advantage of its own acts, which it claims were unauthorized. Nor can it claim that by so doing it has been damaged. Even if the defendant is damaged by the discrimination, still the Constitution of a State has a right to classify property for the purposes of taxation, and all that is necessary is that it shall operate uniformly on each class; and more especially is this so in respect to corporations who take their right, subject to a reserved power, such as is contained in the Constitution of California.

Mr. Desty, in his valuable work on Taxation, vol. 1, p. 91, says:

"The Legislature, apart from constitutional restrictions, may levy taxes and devise ways of apportionment in such manner and to any extent it may deem advisable, and in the exercise of its sovereign power it may adopt any and all means for the purpose of providing revenue, and its decisions as to what is proper, just, and politic, both in respect to the subjects of taxation and the kind and amount of taxes, must be final and conclusive. Its powers are to be exercised in its discretion, and the interest, wisdom, and justice of the representative body and its relations with its constituents furnish the only security against the abuse of that discretion."

In the same volume, pages 93 and 94, he says:

"The power to tax and the power of apportionment and classification are identical and inseparable, and the legislative determination as to the just proportion to be borne by the public and the classification of subjects to be taxed is conclusive, subject only to the constitutional principle

that all of the same class shall bear equal burdens, and that the principle of uniformity be preserved."

In Durant's Appeal, 62 Penn., 494, it is said:

"If the taxation is upon all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the State. If, for example, a general tax were imposed upon all distilleries or owners of distilleries, it would not affect the constitutionality of the tax if the distilleries all carried on their business in a particular section of the country or were few in numbers."

In the case of *Railroad Company* v. *Penniston*, 18 Wall., p. 30, Mr. Justice Strong, in delivering the opinion of the Court, says, in respect to State taxation:

"The extent to which it shall be exercised, the subject upon which it shall be exercised, and the mode in which it shall be exercised are all equally within the discretion of the Legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people, expressed in the State Constitution, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National Government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by National legislation. To the extent just indicated it is as complete in the States as the like power within the limits of the Constitution is complete in Congress."

In the Kentucky Tax Cases, 115 U. S., p. 336, the Supreme Court says:

"The discrimination against railroad companies and their property, which is the subject of complaint, as being unjust and unconstitutional, arises from the fact that, in the legislation of Kentucky on the subject, railroad property, though called real estate, is classed by itself as distinct from other real estate, such as farms and city lots, and subjected to different means and methods for ascertaining its value for purposes of taxation, and differing as

well from those applied to the property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas, and water companies. These latter report to the auditor the total cash value of their property, and pay into the treasury as a tax, upon each $100 of its value, a sum equal to the tax collected upon the same value of real estate, and these reports and valuations are treated as complete and perfect assessments, not subject to revision by any board or Court, and conclusive upon the taxing officers. But there is nothing in the Constitution of Kentucky which requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation, and the valuation of different classes by different methods. The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination, as made between railroad companies and other corporations, in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the Legislature has seen fit to impose."

In the foregoing opinion the Court refers to the fact that there is nothing in the Constitution of Kentucky which requires taxation to be equal and uniform. In some of the States there is such a constitutional provision, and yet the Courts have upheld the classification of property for the purpose of taxation.

State v. *Ogden*, 10 La. An., 402.
New Orleans v. *Kauffman*, 29 La. An., 283.

Even when the word "equal" occurs in such a connection, it means approximative, not mathematical or precise equality, which is impossible. In the first Constitution of California these words did occur: "Taxation shall be equal and uniform throughout the State." But these words

do not occur in the present Constitution, and were purposely omitted. The only words in respect to uniformity in the present Constitution are these: "All laws of a general nature shall have a uniform operation." (Sec. 11, Art. 1; and another provision, prohibiting the Legislature from passing any local or special law where a general law is applicable.)

And right here I desire to quote from a distinguished jurist of California, who never touched upon any subject which he did not irradiate with his great learning and sound judgment when on the Supreme bench of California. After he retired from the bench he was the salaried attorney of the defendant, and represented the defendant as its counsel in much of its litigation before this Court. I quote from *Ex parte* Smith and Keating (38 Cal., 710).

JUSTICE SANDERSON ON CLASSIFICATION.

"The best commentary upon the construction and meaning of the eleventh section of the first article of the Constitution of this State, which declares that 'every law of a general nature shall have a uniform operation,' with which I have ever met, is found in the context of the instrument from which it was borrowed, namely, the sixth section of the first article of the Constitution of Iowa, which reads as follows: 'All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.' Here the precise language of our Constitution is used, but it is accompanied by other language, as part of the same sentence and expressive of the same idea, which serves to disperse the cloud which, by reason of the 'glittering generality' of the language employed, hangs about the meaning of our Constitution.

The meaning of the Constitution of Iowa, and, therefore, the meaning of ours, is obvious from the latter clause of the former Constitution. Its meaning, as has been repeatedly declared by the highest judicial tribunal in the State, is not that general laws must act alike upon all subjects of legislation, or upon all citizens and persons, but

that they shall operate uniformly, or in the same manner upon all persons who stand in the same category; that is to say, upon all persons who stand in the same relation to the law, in respect to the privileges and immunities conferred by it, or the acts which it prohibits. (Smith *v* Judge Twelfth Judicial District, 17 Cal., 554; French *v.* Teschenacher, 24 *id.*, 544; Bourland *v.* Hildreth, 26 *id.*, 256; Brooks *v.* Hyde, 37 Cal., 366) It was not intended by this provision to prevent legislation which is local in its operation or special in its effect. It was not intended to overturn the laws of nature, or disturb the relations of cause and effect, or obliterate distinctions, where, from the very nature and necessity of things, distinctions must exist. It was not intended that all differences, founded upon class or sex, should be ignored. This must be so from the very nature of things, and from the universal custom and practice of lawmakers. A few references to existing laws, whose constitutionality has never been questioned, and without which society would be, in many respects, subject to the mercy of evil-doers, is deemed sufficient to illustrate the fallacy, not to say the absurdity, of the construction for which counsel argue.

The common law and the laws of this State in relation to the competency of witnesses have always, and still do, distinguish between persons, by providing that some shall be allowed to testify and others not. Under the common law and the laws of this State, some persons are allowed to make contracts, while the capacity to do so is denied to others—and the same person is allowed to make certain contracts, and denied the capacity to make certain other contracts; and, especially, from the commencement of English jurisprudence down to the present time, have greater disabilities in respect to the acquisition and enjoyment of property, and the power to make contracts and transact business, been imposed upon females than upon males. And so, on the other hand, have greater burdens always been cast upon males than upon females, as, for example, military and jury duties. If we enter the field of criminal law, the distinction is still maintained. Certain persons are declared to be incapable of crime, while the contrary is true of the great majority. Criminal laws, and they have always existed, which act upon males and not upon females, and others upon females and not males, as

laws against rape, the crime against nature, and laws against prostitution and abortion. To give to this provision of one State Constitution, or to the fourteenth amendment of the Federal Constitution, in view of such legislation, the construction for which counsel contend, would be to erase three-fourths of the statutes of this State, to overturn the foundations of the common law itself, and to discard as useless the main pillars of the social compact," &c.

He says, further, that in these views, Chief-Justice Sawyer and Justice Sprague concurred.

In the Delaware Railroad Tax Cases, 18 Wall., 231, Mr. Justice Field speaking for the Court, says:

"The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion."

Here the laws of Delaware provided that every company of the class designated should, in addition to other taxes, also pay to the treasurer of the State, on the 1st day of July of each year, a tax of one-fourth of one per cent. upon the actual cash value of every share of its capital stock. This was held to be not a tax on the corporate property, but simply a tax on the corporation. The opinion says further:

"The exercise of the authority, which every State possesses, to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other States, and the tax is not on imports, exports, or tonnage, or transportation to other States, cannot be regarded as conflicting with any constitutional power of Congress."

There is the greatest possible divergence in the revenue systems of the different States, one imposing a tax of one

per cent. on the value of railroad property, another fixing by direct legislative act a certain valuation per mile, another imposing by statute a special tax of so much on each $100 of value of railroad property, another exempting for a number of years certain railroads from taxation, another holding that the land of railroad companies is personal property, another requiring the rolling machinery to be assessed as real estate, another making the railroad track, rolling-stock, and all property used in operating the road assessable as a unit by the boards of assessors of the several counties through which the road runs, and still others requiring such property to be assessed by a State board.

The classification is as variant as to railroads as it is in respect to the statute of limitations, the statute of descents, or in respect to issuing writs of attachment. This difference shows clearly how deep-seated in the body politic of the different States is the idea of State sovereignty in such matters. To unsettle these various revenue systems a Federal question will be sought to be raised hereafter, on the ground that railroad corporations or natural persons are denied in this way the equal protection of the laws, and thus the Federal Courts will become the final arbiters of all this legislation involving such alleged infringement.

The following are the remarks of the writer of this brief, and some inquiries put to him in the last Constitutional Convention of California, as reported in the Constitutional Debates, Vol. 3, p. 1278, in respect to omitting the word "equal" from the draft of the new Constitution:

"MR. JOHNSON—Mr. President: The word 'equal' has made a great deal of difficulty in our taxation in this State. It is well known that the decision in the case of *The People* v. *Hibernia Bank* goes upon the ground of the impossibility of assessors assessing credits on an equal basis. That is the basis upon which this decision is rendered, and the word 'equal' in the thirteenth section, in the eleventh article of the present Constitution, has made all this trouble about the taxation of credits and mortgages. Now, sir, it

we eliminate that word, we escape from all that difficulty; whereas, if we retain it, and if we tax credits, as has been shown manifestly to be the sense of this convention, the Supreme Court may say, hereafter, that these assessors cannot assess these credits on an equal basis, and then we will be just where we started from. It is a very easy matter to escape all this difficulty by eliminating that word 'equal.' The only requisite in taxation is that it shall be uniform. It is so laid down in our text-books. It must operate uniformly upon persons and subjects, and, therefore, there is no impropriety in putting that word in the Constitution; but when you add the additional word 'equal' to it, then you put in an element of difficulty. Then it is for the Supreme Court to say, as they have said heretofore, whether or not these credits can be taxed on an equal basis, whether they can be assessed equally. Now, in a great many Constitutions there is nothing said about equality and uniformity, and the whole thing is left to the Legislature; but still the Legislature, in enacting these tax laws, always enacts them upon the basis that the taxes shall be uniform. It is a fundamental requirement. No precedent can be shown where any taxation that is not uniform has been upheld. But this word 'equal' has made the difficulty, as I said before. It has been a direful spring of of woes unnumbered, and the people of this State, from one end of it to the other, have spoken out in favor of the taxation of credits. If we propose to tax credits, and it has been shown by a very large majority that that is the sense of the convention, I say that that word 'equal' should be eliminated, so as not to make an element of discord hereafter in construing this Constitution. If the word 'equal' had not been in there, the decision in the case of *The People* v. *Hibernia Bank* would never have been made as it was. By perpetuating that word we will run the gauntlet of incurring the same kind of a decision.

"MR. CAPLES—I desire to ask if in the gentleman's opinion the word 'uniform' is not subject to the same objection as the word 'equal.'

"MR. JOHNSON—No, sir; I think not.

"MR. CAPLES—Define the two.

"MR. JOHNSON—The idea of uniformity is that it shall be uniform as far as that class of subjects is concerned. There are different methods of taxation. For instance,

you tax credits in one way, while you tax land and personal property in another. Of course there will always be an effort to approach equality. The basis of taxation is the protection that the tax-payer derives from Government, and there is no reason in the world for putting in this word 'equal.' Of course the tax that a man pays for the protection he derives should be based upon the value of his property as near as can be done. But if you put in an iron-clad word of this kind, then it has got to be construed just as you put it into the Constitution.

"MR. CAPLES—Strike both out.

"MR. JOHNSON—I do not think it would be advisable to do that. I think there should be a limit imposed upon the Legislature that the basis should be uniform. We do not want one man taxed different from another man. We do not want one subject taxed different from another subject of the same kind; but let the taxation be uniform. There never was any difficulty about the word 'uniform;' but the whole difficulty has arisen out of the word 'equal.' I think, therefore, that this word should be eliminated. In noticing the Constitution of Pennsylvania, I think you will find this section which the Committee on Taxation reported for the adoption of this convention: 'All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.'"

The sequel was that the words in section 13, article 11, of the old Constitution, to wit: "Taxation shall be equal and uniform throughout the State," were omitted from the draft of the new Constitution, while the succeeding words, "All property in this State shall be taxed in proportion to to its value, to be ascertained as directed by law," were substantially retained in the new Constitution, section 1, article 13, which reads: "All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law."

These changes show clearly that the intent of the framers of the new Constitution was to eliminate any disturbing

element in its system of taxation, which might arise by the retention of the words "equal and uniform."

In *Chicago, Burlington and Quincy Railroad Company* v. *Iowa* (94 U. S., p. 163), Mr. Chief-Justice Waite, in delivering the opinion of the Court, said:

"The statutes divide the railroads of the State into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires."

On this subject of classification I cite the following authorities:

Kitty Roup's Case, 81 Penn. St., 216.

Wisconsin Central Railroad v. *Taylor*, 52 Wis., 37.

The discussion of the subject in the Wisconsin case is very thorough.

Youngblood v. *Sexton*, 32 Mich., 414–415.

In this last case I quote the following from the opinion of the Court, delivered by Judge Cooley:

"It is said the tax is invalid because it is not levied on any principle of equality or uniformity, and consequently lacks one of the essential elements of lawful taxation. If the precise point here is that the tax is unequal because it is not levied in proportion to the business done, then the objection is without force. It may possibly be true that an apportionment according to the business done would have been more just, but a question of this nature concerns the Legislature, and not us. Courts cannot annul tax laws because of their operating unequally. If they could, they might defeat all taxation whatsoever; for there never yet was a tax law that was not more or less unequal and unjust in its practical workings."

Again, he says:

"The question whether a tax is just and equal or not is not a question of law. And this will meet any objection to the law based upon the fact that other kinds of business

are not similarly taxed. Apportionment of taxation is purely a legislative function."

I cite also:

Milwaukee and M. R. R. Co. v. *Waukesha*, 9 Wis., 428.
Johnson v. *Roberts*, 102 Ill., 655.
People v. *Mayor of Brooklyn*, 4 Comst., 419.
State v. *Ogden*, 10 La. An., 402.
New Orleans v. *Kauffman*, 29 La. An., 283.
State v. *Lathrop*, 10 La. An., 402.
M. R. Ft. S. and G. R. R. Co. v. *Morris*, 7 Kan., 210.
Kittaning Coal Co. v. *Commonwealth*, 79 Penn. St., 104–105.
Vasser v. *George*, 47 Mississippi, 713.
Woodbridge v. *Detroit*, 8 Mich., 274.
Waring v. *Savannah*, 60 Ga., 97.
Mayor of Athens v. *Long*, 54 Ga., 330.
Gatlin v. *Town of Tarbora*, 78 N. C., 119.
Burroughs on Taxation, sec. 77, p. 147–159.

Where railroads are operated in more than one county in the State, for the purpose of uniformity and an equitable adjustment of all their rights, it seems highly proper that there should be some central authority to which the whole matter can be referred for apportionment between the counties. This classification, required by section 10 of article 13 of the Constitution of California includes nearly all the railroads in the State. If a railroad is located wholly within a county there is no necessity to refer the assessment to some extra-territorial authority, nor is there any apportionment to be made in such a case. The local authorities would naturally have more and better information on the subject of its assessments than any one else; but it is claimed that under the fourteenth amendment the Constitution of the State makes

an unconstitutional discrimination between railroad corporations and other corporations, not permitting mortgages to be deducted from the assessment in the one case and permitting it in the other. The reasoning of the defendant seems to go to the extent that all corporations should be classified together, and, if not, that it works an inequality; or, rather, that all corporations should be assessed just as natural persons are. If the much vaunted sovereign power of taxation, which a State is supposed to possess, "has this extent, no more;" if the State has no more control over the creatures of its own creation than over natural persons; if it can impose no terms, make no reservations, and demand no compensation when it clothes these railroad entities with the power of eminent domain, itself a sovereign power, as agents of the State, a power not possessed by any but an artificial being, it would seem that we are using a misnomer and the State's limited, instead of sovereign, power of taxation would be a more felicitous designation. This reserved power in dealing with its own creatures is expressed in strong and emphatic language in both of her Constitutions—that of 1849 and that of 1879.

Under the first was this provision:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

Under the latter this reserved power is expressed thus:

"Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section may be altered from time to time, or repealed."

The contention of the defendant reminds us of Gœthe's Faust, where Wagner, delving in his laboratory and mixing his compounds, creates a homunculus, who acts from his

own independent conceits. The creature may ignore its parentage at once, set up for itself, and take for its motto, "*Addictus jurare in verba nullius magistri.*" Under such circumstances it would be dangerous to create corporations, and they would be discountenanced.

After the decision in the Dartmouth College Case it was natural that the States should insert some provision in their organic law to modify the contractual relations which would otherwise subsist between them and the corporation. Henceforth the corporation took its right *cum onere.* The assumption of the corporate relation being purely voluntary, there was no hardship to complain of. If these corporations did not have all the rights of natural persons they became possessed of some which natural persons did not have, such as the condemnation of property for a public use and the subjection of their members to only a limited responsibility. Nor are railroad corporations the only ones under the Constitution of California which are subject to restrictions. Section 9, article 12, of the Constitution says:

"No corporation shall engage in any business other than that expressly authorized in its charter, or the law under which it may have been or may hereafter be organized; nor shall it hold for a longer period than five years any real estate except such as may be necessary for carrying on its business."

If these corporations have grazing lands, as some of these defendants claim, they hold them by virtue of the corporate character which they have assumed, and they should not complain if these lands are not assessed as lands of natural persons. We associate with the idea of a railroad, that of speed, commercial activity, and general intercommunication; anything but rest, and inactivity. The State may regulate it as in the exercise of a public use. If, however, it is proposed by any of these defendants to reverse primal ideas, and lead a grazing and bucolic life,

or like some Tityrus to recline "*patulæ sub tegmine fagi*," still, even this metamorphosis will not change their contractual relations with the Government, or enable them to insist that their lands shall be assessed the same as the lands of natural persons.

They are not to discuss with the State, questions of public policy while they hold on to their certificate of incorporation. The State, in its wisdom, has deemed proper that this differentiation should exist in respect to landed assessments between them and natural persons; and in matters of local concern, involving the running of the State Government, and the mode and classification of taxation for revenue purposes, the State is paramount and cannot be called to account by the creatures of its own making. It is sufficient to know that all of a certain class are included in the taxation programme, and that the law operates uniformly.

Judge Cooley, in his work on Taxation, p. 378, says:

"But it is common to classify them (corporations) separately for taxation, and corporations of different kinds, as railroad, insurance, banking, and manufacturing corporations, are, also, thus classified in the discretion of the Legislature. The method of taxing these artificial bodies, when not fixed by the Constitution or by charter, is left to the legislative judgment, and the diversity actually met with under tax laws is very great."

The decisions as to the reserved power in State Constitutions to alter and repeal the charters of corporations are mostly one way.

In Iron City Bank *v.* The City of Pittsburg, 37 Pa. St. 340, Woodward Judge, delivering the opinion of the Court, it was held that where a bank obtained its charter under a law providing "that the capital stock of such bank shall not be subject to taxation for any other than State purposes," the Legislature may, notwithstanding, authorize the imposition of taxes for other than State purposes by

virtue of the Constitution of Pennsylvania, as amended, which provides that "every such (bank) charter shall contain a clause reserving to the Legislature the power to alter, revoke, or annul the same, whenever, in their opinion it may be injurious to the citizens of the commonwealth; in such manner, however, that no injustice shall be done to the corporators."

In Union Improvement Company *v.* The Commonwealth. 69 Pa. St., 140, it was held that where by a supplemental act in 1862 it was provided that the "capital stock and dividends" of an improvement company should not be taxable, but by the act of May 1st, 1868, "the capital stock of all companies, whether incorporated under any law of this commonwealth, etc., except banks, etc., shall be subject to pay a tax annually at the rate," etc.; that the said act of 1862 was repealed by the act of 1868, and the corporation was liable to taxation under the act of 1868. In the original act of incorporation the Legislature reserved the right to alter, etc., the charter at any time thereafter, and this reservation conferred the power to impose this tax.

In the case of Hewitt *v.* The New York and Oswego Midland Railway Company, 12 Blatchford's C. C. Rep., p. 453, where the Legislature of New York provided by an act in 1866 that the property of the defendant should be exempt from taxation until a certain event should happen, but for a term not exceeding ten years, and in 1874, and as was alleged before such event had happened, the Legislature passed an act subjecting the property of the corporation to taxation for the future; it was held, Mr. Justice Blatchford delivering the opinion, that by reservations in the Constitution and statutes of the State, the Legislature had the right to amend the charter of the corporation by repealing such exemption from taxation; that the reserved power constituted a condition, and that immunity from taxation was subject to be revoked by the State at any time in the discretion of the Legislature. This decision was rendered in 1875.

In the Sinking Fund Cases, 99 U. S., p. 700, the decision was put upon the ground that the right of amendment had been reserved by Congress.

In the case of Appeal Tax Court of Baltimore City *v.* Baltimore Academy of Visitation, 50 Md., p. 438, it was held that immunity from taxation, where the power is reserved to repeal, &c., does not constitute a contract for such immunity.

In the case of Tomlinson *v.* Jessup, 15 Wall., 454, Mr. Justice Field, speaking for the Court, says:

"The original corporators, or subsequent stockholders, took their interest with knowledge of the existence of this power (the reserved power), and of the possibility of its exercise at any time in the discretion of the Legislature. The object of the reservation and of similar reservations in other charters is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference."

Again:

"Immunity from taxation, constituting in these cases a part of the contract with the Government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the Legislature may deem it expedient for the public interests that the revocation shall be made."

This decision was rendered in 1872.

Of course, I admit, as said in Shields *v.* Ohio, 95 U. S., p. 319, that sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration; that this would be beyond the sphere of the reserved power, and that the vested rights of property of corporations, in such cases as that, are surrounded by the same sanctions and are as inviolable as in other cases.

In the case of Greenwood *v.* Freight Co., 105 U. S., page 13, where the charter of a street railroad company

was repealed, there was a reserved power, and it was held that by the exercise of the repealing power, reserved by such a clause, the charter no longer existed, and whatever validity transactions entered into and authorized by it while it was in force may possess, there could be no new transactions dependent on the special power conferred by the charter. The decision says in effect that after such repeal a company could not run its road, or a bank loan or issue money.

Suppose the charter of this defendant, a California corporation, is repealed under the reserved power, could not the State impose conditions on such a corporation, and all corporations, to the effect that if they would submit to be taxed in a certain way they might reincorporate? If the law be as the foregoing authorities clearly show, that under the reserved power the privilege of immunity from taxation can be taken away from corporations, it is not apparent why in the exercise of the same power the State may not exact from the corporations such taxes as it may impose in its wisdom as a condition for continuing to recognize their corporate character.

In the case of the County of San Mateo *v.* Southern Pacific Railroad Company, 8 Sawyer, 238; 13 Fed. Rep., page 754, the proposition which we affirm here as to the operation of this reserved power contained in the Constitution of 1849 and 1879 of the State of California is fairly stated by the learned circuit justice thus: That as a condition in the first place might impose terms as to how the property of the corporation should be taxed, under this reserved power the State still has the right; that the new Constitution in continuing the Southern Pacific Railroad Company, and other railroad corporations in existence, and at the same time authorizing the taxation of their property upon a different valuation, imposes that condition upon them, and that the subsequent exercise of its franchises by the corporation implies assent to the condition. But the

learned circuit justice took the negative of the proposition, and held that the provisions of article thirteen of the Constitution of California are not conditions upon the continued existence of valid corporations, and that the State possesses no power to withdraw corporations from the Federal guaranties; that their property is protected the same as that of natural persons, and the State can only control the franchise. I have endeavored to show that the preponderance of authorities is the other way, and the learned circuit justice seemed to admit this, for he said:

"The general tendency of modern decisions is to treat corporations, with this reserved power, as subject at all times to the will of the State as to their rights, powers, and liabilities. Such unlimited control, in some cases, would, indeed, lift them not only out of the protection of the fourteenth amendment, but also out of nearly all protection, except such as the legislative pleasure of the hour may permit."

But we are not claiming unlimited control. We are simply claiming that, in the absence of this reserved power, the whole subject of classification or apportionment for the purposes of assessment and taxation belongs to the State; that the law must be a general law, however, including all of a class; that, with the reserved power superadded, it unquestionably belongs to the State. We claim that the provision of the fourteenth amendment that the State shall not deny to any person the equal protection of the laws is not a limitation upon the power of the State as exercised on the subject of taxation. The very words, the equal protection of the laws, presuppose the existence of laws by the State, and the inhibition contained in the amendment is more against their unequal enforcement, applying to other departments of the Government—the Executive and judicial departments. To make it operate as a limitation upon the law-making power, and especially in matters of taxation, is to change the whole theory of

republican government. It is to give to a few words an iconoclastic and talismanic power for evil, undoing what has been so well done by the best of American statesmanship from the foundation of the Government up to the year 1866.

To concede away this sovereign right of taxation over everything within its jurisdiction, except where it might impair the efficiency of the powers granted to the Federal Government, would naturally be one of the last concessions that a sovereign State, accustomed to its sovereignty in this respect, would make. It would be like Sampson voluntarily submitting to be shorn of his locks. It would be conceding to a central power what even a private individual like Hampden refused to concede to his King; what our struggling forefathers refused to concede in Boston harbor.

Besides, the last section of the fourteenth article of amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article;" thus, if the advocates of the theory we are combatting are correct, creating a strong, centralized, where once we had a State Government, over the whole domain of State taxation.

In the Slaughter House Cases, 16 Wallace, p. 77, Mr. Justice Miller, referring to the last section of the fourteenth article of amendment, pertinently asks:

"And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? All this and more must follow if the proposition of the plaintiffs in error be sound, for not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment

it may think proper on all such subjects." He says further that such a construction, if approved here, "would constitute this Court a perpetual censor upon all legislation of the States on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment."

THIRD FEDERAL QUESTION—involving also classification and the equal protection of the laws.

That under the Constitution of California, natural persons and corporations, other than such as defendant, have the right to be heard before the County Boards of Equilization in respect to the correction of assessments, but that in the case of corporations, such as defendant, operating a railroad in more than one county, this privilege is denied the defendant, or any privilege to be heard in respect to assessments. This is the third claim of violation of the fourteenth amendment, in respect to not being accorded the equal protection of the laws.

On this question the decision in the Kentucky Tax Cases, 115 U. S., p. 336, is directly in point. The Court says:

"The final point of objection seems to be reduced to this: In the case of ordinary real estate, it is said, when the assessor has made his valuation it is submitted to a Board of Supervisors, who may change the valuation, but not so as to increase it, without notice to the taxpayer, and an opportunity for a formal hearing, upon testimony to be adduced under oath, and with a right of appeal on his part; first, to a county judge, and, again, if the amount of the tax is equal to fifty dollars, to the circuit court. This is contrasted with the proceeding in the case of railroad property before the Board of Railroad Commissioners, in which, it is alleged, there is no notice of an intended change in the valution returned by the company, and no appeal allowed if it is increased. The discrimination, however, is apparent rather than real. An examination of the statute shows that the original valuation of the assessor, in case of ordinary real estate, is conclusive upon the taxpayer, no matter how unsatisfactory; and the appeal allowed is only

from the action of the Board of Supervisors, in case they undertake to increase the valuation made by the assessor. But in case of railroad property, no Board has authority to increase the original assessment made by the Railroad Commissioners, and there is, therefore, no case for an appeal similar to that of the owner of ordinary real estate. But, were it otherwise, the objection would not be tenable. We have already decided that the mode of valuing railroad property for taxation under this statute is due process of law. That being so, the provision securing the equal protection of the laws does not require, in any case, an appeal, although it may be allowed in respect to other persons differently situated. This was expressly decided by this Court in the case of *Missouri* v. *Lewis*, 101 U. S., 22, 30. It was there said by Mr. Justice Bradley, delivering the opinion of the Court and speaking to this point, that 'the last restriction as to the equal protection of the laws is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress.' The right to classify railroad property as a separate class, for purposes of taxation, grows out of the inherent nature of the property, and the discretion vested by the Constitution of the State in its Legislature, and necessarily involves the right, on its part, to devise and carry into effect a distinct scheme, with different tribunals, in the proceeding to value it. If such a scheme is due process of law, the details in which it differs from the mode of valuing other descriptions and classes of property cannot be considered as a denial of the equal protection of the laws."

In the same case, p. 337, the Court says:

"There is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the

methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect, which the discretion of the Legislature has seen fit to impose."

In the case of *S. F. and N. P. R. R. Co.*, v. *The State Board of Equalization*, 60 Cal., p. 30, the Court says:

"The Constitution of the State requires all property to be assessed at its actual value. We are unable to see how the fact that the value of one kind of property is to be ascertained by one officer or Board and the value of another kind of property by another officer or Board, each clothed with the duty and responsibility of ascertaining the actual value, can be held to operate a deprivation of legal protection to the owners of either kind of property. The State Board in the one case, the assessors and county Boards in the other, are but different instrumentalities through which the same result is reached—the fair and just valuation by reference to the same standard—and therefore, the equal and uniform valuation of property for purposes of taxation."

In the case of *State of Missouri, ex rel.*, v. *New Lindell Hotel Company*, 9 Missouri Appeal Reports, p. 452, the Court says:

"But it is perfectly obvious from an inspection of the statute that it provides for two schemes of assessment; one for the whole State, and one for St. Louis county. Section 48, which provides that real estate shall only be required to be assessed once in two years, is among the provisions applicable to the State generally. A separate scheme for St. Louis county is found embodied in sections 74 (73) to 88 (87) inclusive."

It was held by the Court that the general provision contained in section 48 was displaced, so far as St. Louis county was concerned, by the special provisions thus quoted, and no point seems ever to have been made that this difference between the assessments for the State at

large and for St. Louis county was violative of the constitutional provision securing the equal protection of the laws.

In the case of *Porter et al.* v. *R. R. I. and St. L. R. R. Co.*, 76 Ill., page 598, the Supreme Court of Illinois says:

"Some further objections are urged on the ground that the corporations were not notified of the meeting of the Board of Equalization (the State Board of Equalization), or of its intention to adopt the rule by which the assessments were made, and that no right of appeal was allowed. The Constitution does not provide that the Legislature shall require that persons or corporations whose property shall be assessed for taxation shall be notified of the assessments, or the rules adopted whereby to determine the value of the property, or that there shall be allowed the right of appeal in such cases. These matters address themselves purely to the discretion of the Legislature. The law, as it is made, is, in this respect, conclusive."

But as a matter of fact, both before the County Board of Equalization and the State Board of Equalization, an opportunity is given to have assessments reduced.

Sec. 3674 Political Code, heretofore cited, provides for a verified written application to be made to the County Board for that purpose, and sec. 3665, Political Code, also cited, says: "If the owner of a railway assessed by the State Board of Equalization is dissatisfied with the assessment made by the Board, such owner may, at the meeting of the Board, under the provisions of section 3692 of the Political Code, between the third Monday in August and the third Monday in September, apply to the Board to have the same corrected in any particular, and the Board may correct," &c. And a statement is provided for in either case, one to be furnished by the taxpayer to the county assessor and the other to the State Board of Equalization. (Sections 3629 and 3664, Political Code, heretofore cited.)

FOURTH FEDERAL QUESTION.— Due Process of Law. It is also averred in the answer that section 10 of article 13

of the Constitution of California, violates the fourteenth amendment for this alleged reason, that said constitutional provision does not provide for any opportunity for parties to be heard in defense of their rights before the State Board of Equalization, thus not furnishing due process of law.

On this particular point, in the case of the *S. F. & N. P. R. R. Co.* v. *The State Board of Equalization* (60 Cal., p. 30), the Supreme Court of California, after having held that the provision in the Constitution giving power to the State Board of Equalization to assess railroad property is self-executing, adds:

"But the Board had the power under the Constitution. It may be admitted that the Legislature may prescribe the mode of procedure, limit the period in each year within which the Board can assess, determine how their records shall be kept, regulate their conduct to any extent which does not detract from their power nor relieve them of duties which are imposed by the Constitution. Under the Constitution no other officer or Board can assess the property of railroads operated in more than one county, and the State Board is commanded to assess it at its actual value. If the Legislature fails to regulate the mode, the power and duty is in the State Board of Equalization to assess at the actual value. It is of the assessment that petitioner complains. The Legislature cannot relieve the railroad property of all taxation by neglecting to add further machinery to the sufficient direction which is found in the self-executing mandate of the Constitution."

The construction above involved is, on familiar principles, binding on this Court.

I cite also the following cases:

Beers et al. v. *The People ex rel.*, 83 Ill., 403.
Hallo v. *Helmer*, 12 Neb., 93.
Dandy v. *Richardson Co.*, 8 Neb., 508.
Gillett et al. v. *Treasurer of Lyon Co.*, 30 Kan., 166.
McMillen v. *Anderson*, 95 U. S., 37.
Cooley on Taxation, p. 238, 246, 169–170.
Vail v. *Runyon*, 46 N. J. Law, 98.

The Kentucky Railroad Tax Case is decisive on this question. It was argued there that it was not due process of law, because no hearing was authorized before the Board of Railroad Commissioners, who sat as a Board of Equalization, and estimated and corrected the valuations. But Mr. Justice Matthews, in delivering the opinion of the Court, says:

"It has, however, been repeatedly decided by this Court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial, and that 'due process of law,' as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given, and that has been held sufficient. 'In judging what is due process of law,' said Mr. Justice Bradley, in *Davidson* v. *New Orleans*, 96 U. S., 97, 107, 'respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but, if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'" The opinion further states that "in the State Railroad Tax Cases, 92 U. S., 575, 610, when the ascertainment of the taxable value of railroads was the duty of a Board, as in the present case, whose assessment was challenged, for the reason that the proceeding was not 'due process of law,' for want of notice and a hearing, it was said by Mr. Justice Miller, delivering the opinion of the Court: 'This Board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and in the business of assessing taxes this is all that can be reasonably be asked.'"

The opinion further says:

"If the plaintiffs in error have the constitutional right to such hearing, for which they contend, the statute is properly to be construed so as to recognize and respect

it, and not to deny it. The Constitution and the statute will be construed together as one law. This was the principle of construction applied by this Court, following the decisions of the State Court in *Neal* v. *Delaware*, 103 U. S., 370, where words denying the right were regarded as stricken out of the State Constitution and statutes by the controlling language of the Constitution of the United States; and in the case of *Cooper* v *Wadsworth Board of Works*, 14 C. B. N. S., 180, in a case where a hearing was deemed essential, it was said by Byles, J., that although 'there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature.'"

The opinion further says that it was necessary to bring a suit to enforce the collection of the taxes; that the "judgments now under review were rendered in just such actions, so that we cannot escape the conclusion that there is no ground for the plaintiffs in error to contend that they have been rendered without due process of law."

The laws of Kentucky and California are so nearly alike on this subject-matter that the foregoing case is peculiarly applicable here.

Under the light of these authorities, the constitutional provision, if need be, is helped out by the provisions of the Political Code, as to giving notice. In the Constitution of California there is no limitation on the power of the Legislature in this respect; and so, in effect, as we have seen, the Supreme Court of that State holds.

Section 3664 of the Political Code, which, as amended, went into effect March 9, 1883, requires each railroad company, on or before the first Monday in April of each year, to furnish the State Board of Equalization a statement, showing, in detail, the mileage, value, and rolling stock of the railroad, also the gross and net earnings, etc., for the year ending on the first Monday of March in each year; and it is further provided, that "if such statement is not furnished, as above provided, the assessment made by the

State Board of Equalization upon the property of the corporation, person, or association failing to furnish the statement, is conclusive and final."

Now, it is manifest from the above provision of the code that, if the statement is furnished, the assessment made by the State Board is not conclusive. Under Section 3665, Political Code, already set forth in this brief, the State Board must meet at the State Capitol on the first Monday in August, and continue in open session, from day to day, Sundays excepted, until the third Monday in August. And if the owner of a railway assessed by the State Board of Equalization is dissatisfied with the assessment made by the Board, such owner may, at the meeting of the Board, under the provision of Section 3692 of the Political Code, between the third Monday in August and the third Monday in September, apply to the Board to have the same corrected in any particular, and the Board may correct and increase or lower the assessment made by it, so as to equalize the same with the assessment of other property in the State.

In the case of *McMillen* v. *Anderson*, 95 U. S., p. 41, the Court, speaking through Mr. Justice Miller, says:

"Looking at the Louisiana statute here assailed, the act of March 14, 1873, we feel bound to say, that, if it is void on the ground assumed, the revenue laws of nearly all the States will be found void for the same reason. The mode of assessing taxes in the States by the Federal Government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must under our Constitution be lawfully done. But that does not mean, nor does the phrase 'due process of law' mean, by a judicial proceeding. The nation from which we inherit the phrase 'due process of law' has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation. We need not here go into the literature of that constitutional provision, because in any view that

can be taken of it, the statute under consideration does not violate it. It enacts that, when any person shall fail or refuse to pay his license tax, the collector shall give ten days' written or printed notice to the delinquent, requiring its payment; and the manner of giving this notice is fully prescribed. If at the expiration of this time the license be not fully paid, the tax collector may, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property of the delinquent, or so much as may be necessary to pay the tax and costs. Another statute declares who is liable to this tax, and fixes the amount of it. The statute here complained of relates only to the manner of its collection. Here is a notice that the party is assessed, by the proper officer, for a given sum as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed, But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the States now have boards of revisers of tax assessments does not prove that taxes levied without them are void."

In the case of *Kelly* v. *Pittsburgh*, 104 U. S., p. 79, the Court says:

"The main argument for the plaintiff in error—the only one to which we can listen—is that the proceeding in regard to the taxes assessed on his land deprives him of his property without due process of law. It is not asserted that in the methods by which the value of his land was ascertained for the purpose of this taxation there was any departure from the usual modes of assessment, nor that the manner of apportioning and collecting the tax was unusual or materially different from that in force in all communities where land is subject to taxation. In these respects there is no charge that the method pursued is not due process of law. Taxes have not, as a general rule, in this country, since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed,

and the customary usages of the people have established a different procedure which, in regard to that matter is, and always has been, due process of law. The tax in question was assessed, and the proper officers were proceeding to collect it in this way. The distinct ground on which this provision of the Constitution of the United States is invoked is, that as the land in question is, and always has been, used as farm land, for agricultural use only, subjecting it to taxation for ordinary city purposes, deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the State tribunals on that subject, that it is only necessary to refer to those decisions without a restatement of the argument on which they rest. State Railroad Tax Cases, 92, U. S., 575; *Kennard* v. *Louisiana*, *id.* 480; *Davidson* v. *New Orleans*, 96 *id.* 97; *Kirkland* v. *Hotchkiss*, 100 *id.* 491; *Missouri* v. *Lewis*, 101 *id.* 22; *National Bank* v. *Kimball*, 103 *id.* 732."

In the State Railroad Tax Cases, 92 U. S., p. 609, Mr. Justice Miller, speaking for the Court, says:

"But it is charged that the assessment was increased without notice, and that for want of this notice the whole assessment is void. If the railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet, if this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this Board impossible." "The Board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong, and in the business of assessing taxes this is all that can be reasonably asked."

In *Hagar* v. *Reclamation District*, 111 U. S., p. 701, the law is held to be sufficient notice.

Speaking through Mr. Justice Field, the Court says:

"That clause of the fourteenth amendment is found in almost identical language in the several State Constitu-

tions, and is intended as an additional security against the arbitrary deprivation of life and liberty, and the arbitrary spoliation of property. Neither can be taken without due process of law. What constitutes that process it may be difficult to define with precision so as to cover all cases. It is, no doubt, wiser, as stated by Mr. Justice Miller, to arrive at its meaning 'by the gradual process of judicial inclusion and exclusion, as the case presented for decision shall require, with the reasoning on which such decisions may be founded.' (96 U. S., 97–104.) It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be obtained, and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property, which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. (*Hertado* v. *California*, 110 U. S., 516, 536.)

"The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him, or without his being afforded any opportunity to be heard respecting it, the law authorizing it containing no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty, or property. Undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. The necessity of revenue for the support of the Government does not admit of the delay attendant upon proceedings in a Court of justice,

and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in *Davidson* v. *New Orleans:* 'In judging what is due process of law, respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these, and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, or oppressive and unjust, it may be declared to be not due process of law.' The power of taxation possessed by the State may be exercised upon any subject within its jurisdiction, and to any extent not prohibited by the Constitution of the United States. As said by this Court: 'It may reach property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted — in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State, as to the mode, form, and extent of taxation, is unlimited when the subjects to which it applies are within her jurisdiction.' (State Tax on Foreign-held Bonds, 15 Wall., 300, 319.)

"Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll-taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such cases the Legislature in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per

yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel, or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by the law and go into business. Yet there is no need in such case for notice or hearing. The amount of the tax would not be changed by it. But where a tax is levied on property, not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially, and in most of the States provision is made for the correction of errors committed by them through Boards of Revision or Equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

In the case of *Pacific Hotel Company* v. *Lieb et al.*, 83 Ill., page 608, the Supreme Court says:

"The law gives notice of the time and place of the meeting of the Board of Equalization. The Board sits with open doors, and we cannot presume that any evidence presented to it, pertinent to questions which it is its duty to determine, if respectfully presented, and in such form and of such character as to reasonably aid in its deliberations, would be rejected; so even if, by reason of the alleged misfeasance of the assessor and auditor, it was impossible to reach the Board through them, the opportunity of a hearing was not denied."

The law in that State required the assessor to furnish proper blanks to the taxpayer, which the assessor failed to do.

In the case of *State of Missouri ex rel.* v. *Lindell Hotel Company*, 9 Missouri Appeal Reports, page 458, the Court says:

"And while we are ready to concede that where a person's property has been once assessed for taxation, the assessed valuation cannot, without impairing his constitutional rights, be raised without giving him some sort of notice of the proceeding and an opportunity to be heard; yet we are not prepared to go to the length of holding that an actual communication of such a fact to each person so assessed is necessary. The fact that a public statute of which every one must take notice, creates an official board vested with such a power, and requires it to meet for that purpose on certain days, to publish notice of such meetings in the newspapers, and by hand-bills, and provides that persons so assessed shall have an opportunity to attend its proceedings and be heard with reference thereto, so far as they may be affected by them, is, in our judgment, all that the Legislature is bound to concede. The power to raise revenue is necessary to the very existence of government. From its very nature it must be summarily exercised, and does not admit of the slow processes that obtain in ordinary judicial proceedings."

It must be recollected that in the foregoing case, and numerous cases cited therein by the Court, the question was whether an assessment could be raised without notice, and it is in respect to increasing the assessment that the Court uses the foregoing language. But in the cases at bar the contest is as to the original assessment, not that the Board arbitrarily increased it; and this makes the case in 9 Missouri so much the stronger when applied to the contention in the pending cases.

Judge Cooley, in his work on Taxation, second edition, page 48, says:

"It has long been settled that while one is to be protected in his interests by the 'law of the land,' he has a right to 'the judgment of his peers' only in those cases in which it has immemorially existed, or in which it has been expressly given by law. The clause recited from Magna Charta does not imply the necessity for judicial action in every case in which the property of the citizen may be taken for the public use. On the contrary, a legislative

act for that purpose, when clearly within the limits of legislative authority, is of itself the law of the land. And an act for levying taxes and providing the means of enforcement is, as we have seen, within the unquestioned and unquestionable power of the Legislature. It is, therefore, the law of the land, not merely in so far as it lays down a general rule to be observed, but in all the proceedings and all the powers which it points out or provides for in order to give the rule full operation. As has been well said, 'the mode of levying as well as the right of imposing taxes is completely and exclusively within the legislative power which, it is to be presumed, will always be exercised with an equal regard to the security of the public and individual rights and convenience. The existence of government depending on the prompt and regular collection of revenue must, as an object of primary importance, be insured in such a way as the wisdom of the Legislature may prescribe. There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislative will shall direct; and if the officers intrusted with the execution of the laws transcend their powers to the injury of an individual, the common law entitles him to redress. But to pursue every delinquent liable to pay taxes, through the forms of process and a jury trial, would materially impede, if not wholly obstruct, the collection of the revenue.' There is no room for the supposition that in a matter of this public importance, where promptness in collection is always desirable, and often imperative, dilatory proceedings of this nature were within the contemplation of the people when consenting to any general provision of the Constitution. It is safer, and, as we believe, more correct, to say that our Constitutions have been framed and agreed upon in view of an immemorial practice and rule of government, under which the whole subject has been intrusted to the legislative department; and they are to be understood and construed in the light of that practice wherever the people have not expressly undertaken to change it."

He then cites a number of cases decided by this Court, involving the construction of the fourteenth amendment, and adds:

"These cases settle very conclusively the construction of the fourteenth amendment, and decide that the Federal Courts have no general jurisdiction to prevent oppression under State tax laws, nor to give relief against hardships and inequalities in their workings."

It is clear, therefore, in the light of these authorities, that the sovereign power of taxation is an inherent and unsurrendered power; that the exigencies of State governments demand that it should be so; that in the exercise of this right summary procedure is often absolutely required; that where the fourteenth amendment refers to due process of law, it is such process as was recognized at the common law and the States in a given case, and that if due process of law is to be predicated at all of the exercise of this sovereign power, the reference is often to an administrative process of the customary sort rather than a judicial procedure; that under the laws of California, the railroads being authorized to furnish their own statement, and being authorized to apply to the State Board of Equalization to have their assessments corrected in any particular, between the third Monday in August and the third Monday in September, each year, this is due process of law.

In this case the Court expressly finds that defendant did furnish a sworn statement to the State Board of Equalization: "Within due time, the secretary of the defendant filed with the State Board of Equalization the sworn statement required by section 3664 of the Political Code of California." Finding 16, Record, p. 38. Whether defendant applied to have its statement corrected or not, it had an opportunity of doing so; and if it abnegated any of its rights it cannot complain of the laws. Due process of law does not consist in subserving the negligence of corporations or individuals, or in compelling them to present their grievances, real or fanciful.

In Cooley on Taxation, p. 51, he says:

"It has been decided that the revenue laws of a State may be in harmony with the fourteenth amendment,

though they do not provide for giving a party an opportunity to be present when the tax is assessed against him, and to be then heard, if they give him the right to be heard afterwards in a suit to enjoin the collection, in which both the validity of the tax, and the amount of it, may be contested," citing *McMillen* v. *Anderson*, 95 U. S., 37, and *Hogar* v. *Reclamation District*, 111 U. S., 701.

An opportunity to bring a suit is provided for by section 3669 of the Political Code of California, already cited.

Is not this opportunity to bring a suit involving the legality of the tax, or of the assessment upon which the tax is levied, due process of law within the meaning of these authorities cited?

Moreover, instead of there being any invidious discrimination against railroads in the matter of the collection of the taxes assessed against them, the laws of California are more favorable to them than to natural persons. The property of natural persons may be sold for the non-payment of taxes without any judgment, but in respect to railroad corporations this cannot be done, and the claims against them for taxes must be prosecuted to judgment in the Courts.

Due process of law is nothing more than what is called the law of the land in Magna Charta. That instrument declares, "*Nullus liber homo capiatur vel imprisonetur, aut dissaisietur, aut relegatur, aut exulatur, aut aliquo modo destruetur, nec super eum ibimus, nec super eum mittimus, nisi per legale judicium parium suorum, vet per legem terræ.*"

Though called the Great Charter in those times, yet under the theory of our institutions we do not recognize any king or potentate, but the people only, as the source of government, and possessed of the power to give chartered rights. The times have changed. We trace from the inherent source to the throne, or the capitol, and not backward from the throne or capitol to the inherent source. It is not to be supposed that in respect to such inherent rights

as the sovereign power of taxation the people of this country intended to circumscribe or limit their rights, except by the customary procedure among them. The law of the land was appealed to in Magna Charta to prevent arbitrary exaction by the sovereign power without regard to law or custom as existing in those times, and without the consent of the governed or their representatives. When Charles the First still insisted on these tyrannical assessments, which he called loans to him, or the benevolence of the people, it became necessary to reaffirm the doctrines of Magna Charta, and to pass the declaratory statute of the Petition of Right.

This provision in respect to due process of law was inserted in the fourteenth amendment, when those words had received an acknowledged construction in the different States of the American Union as applicable to the subject of taxation therein, and that construction became a necessary and inseparable part of this amendment.

In the case of *High* v. *Shoemaker*, 22 Cal., p. 370, the Supreme Court of that State says:

"It might be admitted that the sale of property for the satisfaction of taxes, together with the expenses of the proceedings, summarily by an officer, without the previous judgment of a Court, is apparently inconsistent with the provision of our Constitution that a man shall not be deprived of his property without due process of law, and yet the Court not be authorized to declare the law void, because universal practice had established, at the time our Constitution was adopted, that this provision in Constitutions was not understood as applicable to proceedings by the State to obtain from citizens their proper contributions to the expenses of administering the Government."

The words that no person shall be deprived of life, liberty, or property without due process of law, or words to that effect, were in most of the State Constitutions long before the adoption of the fourteenth amendment. I refer to the Constitution of California of 1849, of Con-

necticut 1818, of Iowa 1857, of Kentucky 1850, of Maine 1820, of Massachusetts 1780, of Michigan 1850, of Minnesota 1857, of Missouri 1865, of Nevada 1864, of New Hampshire 1792, of New York 1846, of Ohio 1850, of Oregon 1857, of Pennsylvania 1838, of Rhode Island 1842, of Vermont 1793, and of West Virginia 1861.

A judicial construction had been given to those words in the several States, and in the language of the Supreme Court of California in the case of High *v.* Shoemaker, *supra*—

"This provision in Constitutions was not understood as applicable to proceedings by the State to obtain from citizens their proper contributions to the expenses of administering the Government."

In adopting this provision as a part of the fourteenth amendment, the construction given to it in the several States was adopted with it. This should settle finally and irrevocably the meaning of this provision in the fourteenth amendment so far as it relates to the subject of taxation.

I now dismiss this question as to due process of law by quoting from the decision of the learned circuit justice who delivered the opinion in the case of the County of San Mateo *v.* The Southern Pacific Railroad Company, 13 Fed. Rep. On page 751 he says:

"We have no doubt that further legislation might have been adopted providing for notice to the company, and a system of procedure by which it might have been heard respecting the assessment. We do not understand that the Supreme Court of the State intended by the decision cited to hold that the tenth section of the thirteenth article is self-executing, except to the extent that it vests the complete power in the State Board to make the assessment of the property; not that legislation may not be had providing for the mode in which the power of the Board shall be exercised. Indeed, the concluding section of the article authorizes any legislation necessary to give effect to its provisions. Unfortunately no such legislation has been had."

But fortunately by section 3665 of the Political Code as amended March 9, 1883, it is provided:

"If the owner of a railway assessed by the State Board of Equalization is dissatisfied with the assessment made by the Board, such owner may, at the meeting of the Board, under the provision of section 3692 of the Political Code, between the third Monday in August and the third Monday in September, apply to the Board to have the same corrected in any particular, and the Board may correct and increase or lower the assessment made by it so as to equalize the same with the assessment of other property in the State."

The law, therefore, in this regard, stands in a different position from that which existed when the case of the County of San Mateo *v.* The Southern Pacific Railroad Company was tried and submitted in the Circuit Court for the District of California.

Fifth. It is alleged in the answer that defendant's franchise is a Federal one; that if defendant did not become a Federal corporation, yet it holds certain granted powers under the Government of the United States, as the trustee, agent, or instrumentality of that Government, and for certain governmental uses and purposes. That this franchise is not subject to State taxation, and not being assessed separately, but blended together with the assessment of the road-bed, roadway, rails, and rolling-stock, the whole assessment becomes unconstitutional, and null and void. This is the fifth Federal question.

The Claim of a Federal Franchise.

It is conceded that the Central Pacific Railroad Company is a California creation, was first incorporated under the laws of that State. In the case of *The Central Pacific Railroad Company* v. *The State Board of Equalization*, 60 Cal., p. 60, the Supreme Court of that State says; "The petitioner derived its franchise, 'its right to exist,' solely

from and under the laws of the State. When it ceases to exercise all the privileges thus derived (assuming that it may, of its own option, abandon them, and at the same time relieve itself of the duties and obligations necessarily joined with them) it may, perhaps, be in a position to contest the right of the State to tax the moneyed value of the franchise, as actually employed and in connection with the property acquired and held by means of the powers conferred with the franchise. The franchise, at least in such connection, is property subject to taxation.

"We are not required now to decide whether the Congress of the United States has power to exempt from State taxation the property of a corporation created by or organized under the laws of a State; or whether a corporation, the creature of a State law, can, by entering into contract relations with the General Government, withdraw itself from obligations to its creator—obligations which are essential elements of its existence. For the purpose of the case at bar, it may be admitted (in the language of counsel) that the Government of the United States can 'seize upon' the railroad and rolling-stock of a corporation chartered by a State, as the 'means or instrumentality' for carrying into operation a power of that Government, and that it can prohibit taxation by the State of the property thus seized. Admitting all this, there is nothing in *McCullough* v. *Maryland*, 4 Wheat. 316, or in the other cases cited by petitioner, which lays down a rule necessarily subversive of the provisions of the State Constitution."

In *Thomson* v. *Pacific Railroad*, 9 Wall., 587, Chief-Justice Chase said:

"The main argument for plaintiff is, that the road, being constructed under the direction and authority of Congress, for the uses and purposes of the United States, and being a part of a system of roads thus constructed, is, therefore, exempt from taxation under State authority. It is to be observed that this exemption is not claimed under any act of Congress. It is not asserted that any act

declaring such exemption has received the sanction of the National Legislature. But it is earnestly insisted that the right of exemption arises from the relations of the road to the general Government. It is urged that the aids granted by Congress to the road were granted in the exercise of its constitutional powers to regulate commerce, to establish post-offices and post roads, to raise and support armies, and to suppress insurrection and invasion; and that by the legislation which supplied aid, required security, imposed duties, and finally exacted, upon a certain contingency, a percentage of income, the road was adopted as an instrument of Government, and as such was not subject to taxation by the State."

After pointing out the wide difference between the case then under consideration and *Mc Cullough* v. *Maryland*, the learned Chief-Justice proceeded:

"We do not doubt, however, that upon the principles settled in that judgment, Congress may, in the exercise of powers incidental to the express powers mentioned by counsel, make or authorize contracts with individuals or corporations for services to the Government; may grant aids by money or lands, in preparation for, or in the performance of such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution; and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them. But can the right of this road to exemption from such taxation be maintained in the absence of any legislation by Congress to that effect? It is unquestionably true that the Court, in determining the second general question, already stated, did hold that the Bank of the United States, with its branches, was exempted from taxation by the State of Maryland, although no express exemption was found in the charter. But it must be remembered that the Bank of the United States was a corporation created by the United States; and, as an agent in the execution of the constitutional powers of the Government, was endowed by the act of creation with all its faculties, powers, and functions. It did not owe its existence or any of its qualities to State legislation. And its exemption from taxation was

put upon this ground. That such (State) taxes cannot be imposed on the operations of the Government, is a proposition which needs no argument to support it. And the same reasoning will apply to instruments of the Government, created by itself, for public and constitutional ends. But we are not aware of any case in which the real estate or other property of a corporation, not organized under an act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the Government. No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the States, and has never been surrendered. It cannot be so used, indeed, as to destroy or hinder the operations of the National Government, but it will be safe to conclude, in general, in reference to persons and State corporations employed in Government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection.

"We perceive no limit to the principle of exemption, which the complainant seeks to establish. It would remove from the reach of State taxation all the property of every agent of the Government. Every corporation engaged in the transportation of the mails, or of Government property of any description, by land or water, or in supplying materials for the use of the Government, or in performing any service of whatever kind, might claim the benefit of the taxation."

The United States Circuit Court for the District of California is in accord with the Supreme Court of that State on this question. In *Huntington* v. *The Central Pacific Railroad Company*, 2 Sawyer, p. 504, the learned Circuit Judge said:

"There are two grounds upon which the application for an injuction is rested. First, on the ground that the Central Pacific Railroad is an instrumentality constructed in pursuance of acts of Congress, and employed by the National Government in the exercise of its constitutional

powers in providing for the transportation of the mails, the armies of the United States, munitions of war, etc., and and as such instrumentality of the General Government, exempt from taxation. Secondly, that the said taxes have not been assessed in the mode, or upon the principle prescribed by the statute, and for that reason the assessment is void. The first ground has recently been disposed of adversely to the complainants by the Supreme Court of the United States, in the case of *The Union Pacific Railroad Company* v. *Penniston, Treasurer, etc.*, decided at the present term, and it requires no further consideration." (18 Wal. 5.)

In the case of *Railroad Company* v. *Penniston*, 18 Wall. p. 34, the following is taken from the majority opinion:

"It is, however, insisted that the case of *Thompson* v. *The Union Pacific Railroad Company*, differs from the case we have now in hand, in the fact that it was incorporated by the Territorial Legislature, and the Legislature of the State of Kansas, while these complainants were incorporated by Congress. We do not perceive that this presents any reason for the application of a rule different from that which was applied in the former case. It is true that, in the opinion delivered by the Chief Justice, reference was made to the fact that the defendants were a State corporation, and an argument was attempted to be drawn from this to distinguish the case from *McCullough* v. *The State of Maryland*. But when the question is, as in the present case, whether the taxation of property is taxation of means, instruments, or agencies by which the United States carries out its powers, it is impossible to see how it can be pertinent to inquire whence the property originated, or from whom its present owners obtained it. The United States have no more ownership of the road authorized by Congress, than they had in the road authorized by Kansas. If the taxation of either is unlawful, it is because the States cannot obstruct the exercise of national powers. As was said in *Weston* v. *Charleston*, they cannot by taxation or otherwise, 'retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the Federal Government.' The implied inhibi-

tion, if any exists, is against such obstuction, and that must be the same, whether corporation whose property is taxed was created by Congress or by a State Legislature."

We refer again to the case of *Porter et al.* v. *R. R. I. and St. L. R. R. Co.*, 76 Ill., p. 585, and the other cases cited in this brief, as to the proper methods of assessing railroads, and that the franchise must be assessed as an entirety, if assessed at all.

To the argument of counsel for the defendant, that the franchise of these corporations, and their other property, should not be assessed for the purposes of taxation, I deem it sufficient to oppose the decisions in the foregoing well adjudicated cases.

It should also be borne in mind that the Constitution of a State is not to be declared unconstitutional, except on very clear grounds. Every presumption is in favor of the constitutionality of the Constitution of a State and the constitutionality of statutes. On such a proposition it is needless to incumber this brief with an array of authorities. I simply cite from the majority opinion of the court, delivered by Mr. Chief-Justice Waite, in *Munn* v. *Illinois*, 94 U. S., p. 123. He says: "Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the Legislature should be sustained."

I have thus far argued No. 664, but the statement of the case, the assignment of errors and the argument are intended to apply to all the cases. I have only a few additional words to add in respect to cases No. 660, 661, 662, 663, and 1157. In No. 660 the defendant in error is the same as in No. 664, and Finding 1, Record, p. 39, expressly says that the State Board of Equalization "assessed the franchise, roadway, road-bed, rails, and rolling-stock of the defendant in the sum of eighteen millions of dollars; that the Board apportioned the assessment as alleged in plaintiff's complaint." Copies of the "Record of Apportionment," and the "Rec-

ord of Assessment of Railways," are embodied in, and made a part of, this Finding. From these records, it is apparent that only 602.22 miles of this railroad of the Central Pacific Railroad Company were assessed, and the defendant, in its answer, admits that that is the total length of its road in the State of California. (Record, folio 19.) It is further apparent that the defendant could not have been assessed for the five miles across the Bay of San Francisco.

Record, page 41, folio 111, says:

"The State Board of Equalization being in session on this, the 18th day of August, 1883, all the members being present, and having under consideration the assessment of the franchise, roadway, road-bed, rails, and rolling-stock of the Central Pacific Railroad Company, within the State for the year 1883, and it appearing to this Board that said company, on the first Monday in March, in the year 1883, at 12 o'clock meridian of that day, owned, and still owns, 602.22 miles of railroad within this State, which at said time and day in March was, and still is, operated in more than one county, being the entire railway of said company within this State, and which, with the right of way for the same is described as follows: [*'Giving the description which shows clearly that the distance across the bay was not assessed, and that no steamers were assessed.' After giving this description, it is added:*] And it appearing that the actual value of the franchise, roadway, road-bed, rails, and rolling-stock of said company within this State at the said date and time in March was, and still is, the sum of eighteen million dollars; therefore, it is ordered that the said franchise, roadway, road-bed, rails, and rolling-stock of the said Central Pacific Railway, for the year 1883, be, and the same are, hereby assessed to the said Central Pacific Railroad Company at the sum of eighteen million dollars."

The foregoing is taken from the State Board of Equalization's Record of the Assessment of said company. Referring to this same assessment, Finding 15 says: "Said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based, and no other assessment that (than) the aforesaid was ever made of said

property or any part thereof for said fiscal year." The fact that immediately following the above it is added, "said assessment included all property and kinds of property mentioned in section 3665 of the Political Code of California, as amended March 9, 1883, except depots, stations, shops, and buildings erected upon the space covered by the right of way, which last mentioned property was assessed, as provided in said section, by local assessors," does not raise a presumption of fact that there were any steamers, simply because the word "steamers" occurs in section 3665, there being nothing whatever in the findings to show that there were any steamers in fact; and if a fence is a building, as we claim it is, then it appears that the buildings (fences) erected upon the space covered by the right of way were assessed by the local assessor, and not by the State Board of Equalization.

The words "fences," "steamers," "distance across the Bay of San Francisco," do not appear at all, or any of them, in the findings, except in case No. 1,157, nor in the Record of Apportionment, nor in the Record of Assessment of Railways by the State Board of Equalization.

Section 3665 of the Political Code mentions steamers which are engaged in transporting passenger and freight cars, not all steamers, and there is nothing in these findings in the first place to show that defendant had any steamers, or in the second place, that, if it had, the steamers were engaged in that kind of transportation. Unless they were actually engaged in that kind of transportation, they are not mentioned as property for the purposes of assessment, or any other purpose, in said section. The franchise, roadway, road-bed, rails, and rolling stock are all mentioned; indeed, we cannot conceive of a railroad without these different constituents entering into the conception, but we can conceive of a railroad without steamers.

The Constitution itself fixes how steamers should be assessed, section 10, article 13. It was not necessary that

they should be mentioned in section 3665. In the case of City and County of San Francisco *v.* The Central Pacific Railroad Company, 63 Cal., 467, already referred to, the Supreme Court of California says "that the assessment of steamers pertained to the local assessor," under the foregoing constitutional provision. Consequently, so much of section 3665 as requires the State Board of Eqalization to assess steamers of a certain description is null and void. This same general language, "said assessment included all property and kinds of property mentioned in section 3665," occurs in the next case, No. 661, where the People of the State of California is plaintiff in error, and the Southern Pacific Railroad Company is defendant in error, and yet, as a matter of fact, there were no steamers to be assessed and no intervening waters to be traversed.

Besides, the certified copies of the "Record of Apportionment" and the "Record of Assessment of Railways," which are incorporated in the findings in some of these cases, are made by the code *prima-facie* evidence of the assessment, the property assessed, &c. (Section 3670 Political Code.) If steamers had been assessed, or the distance across the intervening waters, and the Court had so found, in a matter of this gravity it would have appeared in the findings clearly and beyond all controversy, for these matters were distinctly alleged and relied upon in the answer, and set forth with minuteness and detail.

The words, "said assessment included all property and kinds of property mentioned in section 3665 of the Political Code," which, I believe, occur in all the cases, certainly do not include fences, for the word "fences" does not occur in section 3665, unless, as we have already argued, a fence is a building, in which case it actually was assessed by the local assessor, as appears clearly from the findings:

"Said assessment included all property and kinds of property mentioned in section 3665 of the Political Code of California. as amended March 9, 1883, except depots, stations, shops, and buildings erected upon the space covered

by the right of way, which last-mentioned property was assessed, as provided in said section, by local assessors."

The very general phraseology used in reference to section 3665 cannot control the language all through the findings in cases Nos. 660, 661, 662, and 663, showing clearly that it was the franchise, road-bed, roadway, rails, and rolling-stock which were assessed by the State Board of Equalization, and nothing else. As far as case No. 1157 is concerned, I rely upon the points taken in the brief of Messrs. Shellabarger & Wilson.

In conclusion, I have to say, that the present Constitution of California needs no defense at my hands. It was adopted by her people by a majority of nearly eleven thousand, and amid changeful times all efforts to amend it, in any substantial particular, have, in nearly every instance, proven a failure.

Although it has been misrepresented and maligned, it has held its abiding place in the affections of the people. It traces its dominant ideas to the true theory of American institutions, and to doctrines which found favor with this learned Court in what is known as the Elevator Cases. Those decisions awakened the sense of the people to their ancient rights in controlling corporations, or individuals, in the exercise of a public use; to principles which, though they had been encroached upon by every corporate device and lain dormant for more than two centuries, were familiar principles as long ago as the days of Lord Chief-Justice Hale.

To the personnel of that Convention not only dignified labor contributed its contingent, but also the learned professions and different Departments of the State and National Governments. Ex-United States Senators, ex-members of the House of Representatives, ex-Supreme Court Justices, the brightest lights of the San Francisco bar, and learned writers of text books in the law, were of that Convention. Such men can afford to have their work criticised, or even stigmatized, by the advocates of monopoly without any loss of self-respect or of estimation among intelligent and fair-minded men.

That Constitution is now submitted to the judgment of a tribunal far removed from clamor or prejudice, which enjoys the confidence of the people of the whole country as the safeguard of American liberty, and the proud distinction of being the successors of a line of eminent jurists, such as a Marshall, a Story, and a Chase. The old masters have gone, but their work and bright example still remain. An independent judiciary is and will ever continue to be the brightest particular jewel in this free land.

With the decision of such a tribunal we shall be content; the people of California will be content; the people of the Union will be content. The sovereign right of taxation is involved in the question at bar. Its importance cannot be overstated. On the solution of this question depends the almost regal or vassal character, not only of California, but our whole sisterhood of American States. She represents them in this contest; and in her name and in their name I now submit to the highest earthly tribunal the highest earthly question which can effect a free people, this question of domestic taxation, sovereign or limited, which the States of the Union possess.

If the defendant cannot be made to pay its taxes, then it would seem that no citizen of California can be made to pay his. He is under the guarantee of the Constitution that all property shall be taxed according to its value. He is entitled to the equal protection of the laws secured by the fourteenth amendment. He cannot be justly overburdened by taxation by reason of defendant's default. The result must be the relegation of the tax-gatherer to the private station, the suspension of the Courts, the decay of public institutions, the closing of the schools, the general paralysis of all industries, all enterprise, and the legacy of a name only for what was once in fact a powerful and imperial State. This is the legitimate outcome of the defendant's contention, in endeavoring to escape from the common burdens.

G. A. JOHNSON,
Attorney General of California.

IN THE

Supreme Court of the United States

OCTOBER TERM 1887.

Nos. 660, 661, 662, 663, 664, and 1,157.

THE CALIFORNIA TAX CASES.

ORAL ARGUMENT OF GEO. A. JOHNSON,

Attorney-General of California.

Press of Thomas McGill & Co., Washington, D. C.

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Supreme Court of the United States.

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THE CALIFORNIA TAX CASES.

Oral Argument of Geo. A. Johnson, Attorney-General of California.

MAY IT PLEASE THE COURT:

As the equal protection of the laws has been discussed very prominently in the cases at bar by my learned friend from Vermont, Mr. Edmunds, and by my learned friend from New York, Mr. Evarts, I shall first discuss that question. Then I shall have something to say about due process of law, and about the taxation of franchises and the means and instrumentalities of the General Government in carrying out its granted powers. After which, I shall endeavor to furnish the Court with a differential summary of the methods or process in California for the assessment and taxation of property by the State Board of Equalization and by the County Assessors and County Boards of Supervisors.

Before the adoption of the fourteenth article of amendment to the Constitution of the United States in 1866, it was not pretended that the States had to depend upon regular

judicial proceedings for the collection of taxes. The process was exceptionally summary, not, however, to say arbitrary. Neither the States nor the country from which we derive our jurisprudence in the main depended upon the Courts for the means with which to use the machinery of government. It was not regarded as covered by Magna Charta in the sense that the interposition of the "pares" was necessary, in such matters necessitating prompt and decisive action. It was otherwise with life and liberty. In these matters it was better to submit to the "law's delay," than that any person should be unjustly condemned and deprived of either personal liberty or personal security. In such matter there was no imperious necessity for making haste, to the prejudice of the citizen.

And the reason given for this distinction is said to be this: The paramount importance that the wheels of government should rotate without attrition, that the Courts should be kept open, and that the State should not lose its name and its autonomy. Otherwise all taxation might be defeated while the gradual process of judicial evolution was going on. As said by Mr. Justice Cooley in Youngblood *v.* Sexton, 32 Michigan—

"Courts cannot annul tax laws because of their operating unequally. If they could, they might defeat all taxation whatsoever; for there never yet was a tax law that was not more or less unequal in its practical workings."

In the same opinion he also says:

"The question whether a tax is just and equal or not is not a question of law. And this rule will meet any objection to the law based upon the fact that other kinds of business are not similarily taxed. Apportionment of taxation is purely a legislative function."

The same has been said so often in effect by this Court and other Courts that the mere reference to this differentation between life and liberty on the one hand, and taxation of property on the other, seems to be trite.

In other words, taxation and the collection of taxes have always been *sui generis*.

Not that taxes could be imposed without law, without representation; not that they should be the mere out-cropping of the violation of any one man, or of some self-constituted power;—but what I mean to say is, that the Legislature of the county or State was sovereign in determining the scope of taxation, in imposing the burden, in establishing some process to effectuate the collection of the tax, judicial, semi-judicial, or administrative, as the case might be, so that the cardinal principles of a free Government were observed and kept intact, and so that the legislation did not impinge upon the Constitution or statutes of some central or Federal power.

Before the adoption of the Fourteenth Amendment, if there was any power in the State which was regarded as sovereign, it was that of taxation. It was one of the sovereignties of the State as much so as the right of eminent domain.

The right of classification or apportionment, apart from constitutional restrictions, was an incident in the power of taxation, and inseparable from it, to be exercised in the discretion of the Legislature.

Says Mr. Justice Strong in the case of Railroad Company *v.* Penniston (18 Wall., p. 30):

"That discretion is restrained only by the will of the people, expressed in the State Constitution, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National Government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated, it is as complete in the States as the like power within the limits of the Constitution is complete in Congress."

Before the adoption of the Fourteenth Amendment, the revenue systems of the States were as diverse as might be

expected from States sovereign in this particular. There were many and various kinds of exemptions from the common burden, thus imposing additional taxation upon the non-exempted. Sometimes a railroad, sometimes ministers of the Gospel, sometimes certain tools of mechanics, sometimes even pianos and professional libraries, have been exempted, just as the legislative conscience might dictate. On the other hand, certain kinds of property have been burdened with more taxation than others, and at all times there have been extremists who have favored the taxation of some one thing—such as land, for instance—and disburdening everything else, holding that by some system of repercussion such taxation would gradually equate and diffuse itself, thereby burdening all other property. And it does not appear that under this sovereign power, before the adoption of the Fourteenth Amendment, apart from State constitutional restrictions, this might not be done.

Besides, there were provisions in nearly all the State Constitutions against depriving the citizen of life, liberty, or property without due process of law. These words had received an acknowledged construction. They were no new words; they had long before operated as limitations upon the legislative power.

So, in the case of High *v.* Shoemaker (22 Cal., p. 370), the Supreme Court of that State says:

"It might be admitted that the sale of property for the satisfaction of taxes, together with the expenses of the proceedings, summarily by an officer, without the previous judgment of a Court, is apparently inconsistent with the provision of our Constitution that a man shall not be deprived of his property without due process of law, and yet the Court not be authorized to declare the law void, because universal practice had established, at the time our Constitution was adopted, that this provision in Constitutions was not understood as applicable to proceedings by the State to obtain from citizens their proper con-

tributions to the expenses of administering the Government."

At the time of the adoption of the Fourteenth Amendment there was no complaint in respect to this subject of taxation, nor that the States were imposing any onerous burden on any person or persons. The genesis of the amendment was in the condition of the negro race; the claim that this race was deprived of certain civil rights; that after their enfranchisement something more was necessary for their protection, and something more was necessary to be formulated into constitutional law. It was manifestly with this view that this amendment was proposed by Congress and ratified by the States.

Under these circumstances the Fourteenth Amendment was adopted, and it should be interpreted in the light of those past transactions. Having incorporated into this amendment the provision that no State shall deprive any person of life, liberty, or property without due process of law, and that provision being in nearly all of the State Constitutions at the time of the adoption of the amendment, the construction given by the States to those words "due process of law" became part and parcel of the Fourteenth Amendment. The succeeding clause in the fourteenth article, that no State shall "deny to any person within its jurisdiction the equal protection of the laws," contains new matter.

This equality clause must, however, be also construed in the light of the surroundings to which we have already adverted—in the light that the whole scheme of taxation was, and ever has been, *sui generis;* and, being *sui generis*, it could not have been the intention to engraft upon it the strict rules which obtain in ordinary legislation. To attempt to do so would be a vain endeavor to adjust a helmet and greaves to the torsi Belvidere.

Taxation being at the time so unequal in the States, or, at least, so diverse; the classification being measured only

by the will of the sovereign power which adopted it; the exemptions being based upon no permeating idea, and embracing things in their nature entirely dissimilar, from a railroad to a minister of the gospel—it certainly could not have been the intention to subject all this kind of legislation to the scrutiny and control of the equality clause.

Again, the States could not have so understood it in ratifying this amendment. This subject of taxation has always been associated with the idea of power. It is the imperial emblem. It constitutes the majesty of States. They had always been accustomed to it without stint or diminution from the foundation of the Government. That a State should voluntarily abnegate this power, which acknowledged no superior than the State Constitution, except in the cases already mentioned, or where taxation impaired the efficiency, as recognized, of the Federal Constitution or statutes, and that it should subject its laws to the surveillance and control of a few over-mastering words, is scarcely within the range of ordinary construction.

These six words, "the equal protection of the laws," have never received a definition. The argument from inconvenience is worth something in doubtful cases as showing, or tending to show, that a certain construction should not be given, and could not have been intended, from the disastrous consequences which would flow from it. In the event of a certain construction, the revenue systems of all the States would have to be overhauled, their autonomy trampled upon; State questions heretofore would become Federal questions, and the Federal Courts would become as beehives of litigious industry.

Laws limiting corporations in holding only a certain amount of real estate, as in California and other States, would have to succumb to a superior power.

Without seeking further to define it, I argue, therefore, that the Fourteenth Amendment does not apply to the subject of taxation, believing that the definition of the amend-

ment should be left to the "gradual process of inclusion and exclusion," as so happily expressed, until its partitions are apparent and its bounds can be admeasured. Its language is peculiar. It does not say that the laws shall be equal; which was the most facile and natural language that could have been used if such was the intention. It simply says that the equal protection of the laws shall not be denied. It seems to contemplate laws as existing, and furnish a safeguard against their denial to any one. It would seem more properly to refer to the executive and judicial departments of government; but however this may be, it may be safely assumed that it was never intended by this amendment to apply the square and line to so complex a system as taxation, with its infinite ramifications and divergencies, and with its summary procedure; to make that normal which in its very nature and essence is in so many respects abnormal.

In some of the States where there is a provision that taxation shall be equal and uniform it is held that the States may classify property for the purposes of taxation. If the words "the equal protection of the laws" include taxation, the words are tantamount to saying, as far as taxation is concerned, that taxation shall be equal and uniform, and nothing more.

I assume, therefore, that the law in respect to taxation is the same since the amendment that it was before; that the States are unshorn of their sovereignty in this respect as much so as in the matter of eminent domain; that the inseparable incident of taxation, that of classification, still belongs to the States; that the State laws and Constitutions in this regard can still stand, and this amendment stand; that no procrustean rule has been established in a matter of so much gravity, involving the discharge of the various duties appertaining to State governments, the keeping open the Courts, the education of the people, the protection of all, and the revolving in its orbit of the State itself

without impinging upon, and without being impinged upon, by the larger orbit of the United States.

Besides, it must be remembered that the "pervading spirit" of the Fourteenth Amendment, as said in the Slaughter-House Cases, "is to confer citizenship on the negro race, just released from bondage, and to prohibit hostile discrimination against that race. It must also be remembered that the Constitution or statutes of a State are not to be set aside on light and trivial grounds. A very clear case must be presented of their unconstitutionality, or the Constitution and statutes will stand. It must also be remembered that it is as much a part of the Federal Constitution as the Fourteenth Amendment, that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.'"

This brings me to the subject of classification for the purposes of taxation, which is the dominant question in the cases at bar. If the words "the equal protection of the laws" include the subject of taxation, is California's Constitution and are California's laws obnoxious to this test?

My learned friend from New York tells us that the word taxation is derived from the Greek *tasso*, to arrange. This is what I claim for it—an arrangement. Here the etymology of the word and custom, "*quem penes arbitrium est, et jus, et norma loquende*," as Horace says, are in happy accord.

This matter of classification not only appertains to taxation, but it is a distinguishing feature of all laws. It must necessarily lie in a great degree in the discretion of the Legislature. We classify as to the Statute of Limitations the Statute of Descents, the right to issue attachments, and the jurisdiction of the Courts. As Mr. Justice Sanderson says, in *Ex-parte* Smith and Keating, 38 Cal., 710:

"The common law and the laws of this State in relation to the competency of witnesses have always, and still do,

distinguish between persons, by providing that some shall be allowed to testify and others not. Under the common law and the laws of this State some persons are allowed to make contracts, while the capacity to do so is denied to others, and the same person is allowed to make certain contracts, and denied the capacity to make certain other contracts; and, especially, from the commencement of English jurisprudence down to the present time, have greater disabilities in respect to the acquisition and enjoyment of property, and the power to make contracts and transact business, been imposed upon females than upon males. And so, on the other hand, have greater burdens always been cast upon males than upon females, as, for example, military and jury duties. If we enter the field of criminal law, the distinction is still maintained. Certain persons are declared to be incapable of crime, while the contrary is true of the great majority. Criminal laws, and they have always existed, which act upon males and not upon females, and others upon females and not males, as laws against rape, the crime against nature, and laws against prostitution and abortion. To give to this provision of our State Constitution, or to the Fourteenth Amendment of the Federal Constitution, in view of such legislation, the construction for which counsel contend, would be to erase three-fourths of the statutes of this State, to overturn the foundations of the common law itself, and to discard as useless the main pillars of the social compact," &c.

This classification given by the late Mr. Justice Sanderson is as to persons; but it is claimed that in respect to taxation there cannot be any classification of persons; that the classification must be based on some other distinction. Without assenting to this, I will proceed to inquire whether or not the classification, for the purposes of taxation under the Constitution and laws of California, is based upon persons or property.

Article 13 of the Constitution of California is on one special subject—that of revenue and taxation—and the Legislature is given plenary power in the thirteenth section of the article to carry out its provisions. What is

to be taxed? All property in the State not exempt, in proportion to its value, to be ascertained as provided by law. A mortgage for the purposes of taxation is treated as an interest in the property affected thereby, except as to railroad and other *quasi*-public corporations. That evidently means except as to the property of railroad and other *quasi*-public corporations. "The taxes so levied shall be a lien upon the property and security." "The Legislature shall have the power to provide by law for the payment of all taxes on real property by installments." It is made the duty of the Legislature to require each taxpayer to furnish annually a statement, under oath, of all his real and personal property. Boards of Equalization are provided for to equalize the valuation of the taxable property. All property is to be assessed in the local district, except the franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county, which shall be assessed by the State Board of Equalization at their actual value. Now, all this relates to property taxation.

But there is a distinct section, which does not aspire to the creation of a property tax, but does contemplate a personal tax. It reads as follows:

"Income taxes may be assessed to, and collected from, persons, corporations, joint-stock associations, or companies resident or doing business in this State, or any one or more of them, in such cases and amounts and in such manner as shall be prescribed by law."

Until we come to this section—section 11, article 13, of the Constitution—the classification is a classification of property, and not of persons. We have very high authority for this classification. As said by the Supreme Court in the Kentucky Tax Cases—

"There is nothing to forbid the classification of property for purposes of taxation, and the valuation of different classes by different methods. The rule of equality in respect to the subject only requires the same means and methods

to be applied impartially to all constituents of each class, so that the law shall operate equally and uniformly upon all *persons* in similar circumstances. There is no objection, therefore, to the discrimination, as made between *railroad companies and other corporations*, in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the Legislature has seen fit to impose."

In that case it is said further that—

"In the Legislature of Kentucky on the subject, railroad property, though called real estate, is classed by itself as distinct from other real estate, such as farms and city lots, and subjected to different means and methods for ascertaining its value for purposes of taxation, and differing as well from those applied to the property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas, and water companies."

It is further said:

"The right to classify railroad property as a separate class for purposes of taxation grows out of the inherent nature of the property and the discretion vested by the Constitution of the State in its Legislature, and necessarily involves the right on its part to devise and carry into effect a distinct scheme, with different tribunals, in the proceeding to value it."

Thus it is apparent that the property of railroad corporations may be classified distinct from the property of other corporations, and that there may be a classification of certain real estate as distinct from other real estate. Why may not there not be a classification of certain railroad property as distinct from other railroad property? It is said that under the Constitution of California all railroads are not classified together, but that for the purposes of assessment the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county

are classified separately from the property of other railroads. There are many and weighty reasons for this. Under the Constitution it is evident that the franchise, roadway, road-bed, rails, and rolling-stock of such railroads operated in more than one county are to be assessed as a unit. This unit may extend, and does extend, to the boundaries of the State. It is very different from property situated entirely in one county, which may be at all times subject to the supervision of the local assessor in making his judicial assessment of its value. The inherent nature and use of such property as that of defendants calls for this classification. The franchise, roadway, road-bed, rails, and rolling-stock are to be assessed at their actual value. The actual value of these different constituents depends on their unitary character. They would have comparatively little value if segregated. United, they become of great value. A separate thread of wire is weak, but when wire after wire is massed and corded together, great structures may be held in suspension by such a combination.

Under such circumstances, it is eminently proper that this matter of assessment should be remitted to some central board, in order to carry out the mandate of the Constitution, that property shall be assessed in proportion to its value. To assess it otherwise would be to defeat the constitutional mandate, for the local assessor could not know, and has not opportunities to know, its unitary value, and it must be assessed as a unit. It is really a classification according to business. And in Chicago, Burlington, and Quincy Railroad Company *v.* Iowa it is said:

"The statutes divide the railroads of the State into classes according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class; and this is all the Constitution requires."

It is further claimed that the Constitution admits of another improper classification: that, for the purposes of assessment

and taxation, a mortgage, deed of trust, contract, or other obligation by which a debt is secured is treated as an interest in the property affected thereby, except as to railroad and other *quasi*-public corporations; that, except as to them, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, is to be assessed and taxed to the owner of the property, and the value of such security is to be assessed and taxed to the owner thereof. This is claimed to be an unjust discrimination as against such corporations as defendant.

This is simply an apportionment into two interests where only one interest existed before. The mortgagor has one interest, the mortgagee has the other. The assessment-roll, however, remains the same; nothing is added to it, nothing is subtracted from it. The railroad property is not assessed any higher than it was before such segregation into distinct interests. The railroad does not have to pay any higher or different rate of taxation. In other words, the Constitution in effect says that, as to the property of persons other than such as defendant, the equities between them and the mortgagee are adjusted by the Constitution itself; but that, as to the property of persons such as defendant, they may adjust their own equities with their bondholders. Is there any hardship about this? Suppose it was not feasible to adjust such equities in the latter case by an iron rule of law or the Constitution, should that prevent an adjustment as between other persons which is entirely practicable? The very fact that it is practicable in the one case and impracticable in the other is the surest defense of the constitutional provision.

It must also be remembered that, even as to *natural persons* and other persons, where property is segregated into distinct interests by the Constitution, for the purposes of assessment and taxation, the taxes so levied are made *a lien both upon the property and the security. They are a lien upon*

the property of such persons just as much as they are a lien on the property of such corporations as defendants, until the taxes are paid, both on the property and the security upon the two interests into which the property has been distributed.

The Constitution is prospective in regard to this distribution, but there is a lien for all the taxes, in respect to all persons, just as before the distribution was made.

The discrimination, therefore, between such corporations as defendants and other persons becomes less and less, "and thin partitions do their bounds divide."

But, it may be asked, was it impracticable to segregate into distinct interests as to the property of such corporations as defendants? We claim it so to be. The Central Pacific is the owner of a line of railroad extending from the Pacific Ocean across the State of California and the State of Nevada to Ogden, in the Territory of Utah. The lands covered by its land mortgage are situate in the States of California and Nevada and Utah Territory.

The mortgage bonds are held partly in California and partly outside of California, possibly at every money centre, every commercial mart. It would be impossible for any assessor or assessing board to know how many were outstanding at any given time.

Besides, some of the mortgage lands were earned, some unearned, some patented, some unpatented; and the number of acres was continually fluctuating by reason of sales made, leaving the whole status of the land grant in a mercurial condition.

It is not apparent how there could be any apportionment into interests for the purposes of taxation in this kind of a case; and, besides, if such had been authorized by the Constitution to be made in the future with respect to such corporations as the Central Pacific and the Southern Pacific Railroad Companies, it would have had a tendency to depreciate their bonds, render them insecure, and defeat the very end to be subserved—the adjustment of all these matters on some equitable basis. For these reasons the

Constitution thus classifies, and there was no intention to discriminate against railroad property.

"*Lex non cogit ad vana seu impossibilia.*" What is impracticable cannot be made practicable by a simple legislative or constitutional fiat.

But with the policy of legislation in any event the Courts have nothing to do. That is simply a legislative function.

It is sufficient to know that the framers of the Constitution in their wisdom have ordained such a classification; that they constituted the proper tribunal to determine this matter; that they have determined it; and that their determination does not affect the essential nature of this in common with all other free governments.

In the Delaware Railroad Tax Cases it is said that—

"The State may impose taxes upon the corporations as an entity existing under its laws, as well as upon the capital stock of the corporation or the separate corporate property. And the manner in which the value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion."

So Judge Cooley says, in his work on Taxation, p. 378:

"But it is common to classify them [corporations] separately for taxation; and corporations of different kinds, as railroad, insurance, banking, and manufacturing corporations, are also thus classified in the discretion of the Legislature. The method of taxing these *artificial* bodies, when not fixed by the Constitution or by charter, is left to the legislative judgment, and the diversity actually met with under tax laws is very great."

But, as I have already said, I do not admit that there may not be a classification as to persons under certain circumstances, when it is not arbitrary, but founded on some permeating principle.

In Durant's Appeal, 62 Penn., it is said that—

"If the taxation is upon all of a class, either of persons or things, it matters not whether those included in it be

one or many, or whether they reside in any particular locality, or are scattered all over the State. If, for example, a general tax were imposed upon all distilleries or owners of distilleries, it would not affect the constitutionality of the tax if the distillers all carried on their business in a particular section of the country, or were few in numbers."

So, in the Kentucky Tax Cases, it is said that—

"The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."

So, in the case of *Ex-parte* Smith and Keating, 38 Cal., Mr. Justice Sanderson says:

"The meaning of the Constitution of Iowa, and, therefore, the meaning of ours, is obvious from the latter clause of the former Constitution. Its meaning, as has been repeatedly declared by the highest judicial tribunal in the State, is not that general laws must act alike upon all subjects of legislation, or upon all citizens and persons, but that they shall operate uniformly, or in the same manner, upon all persons who stand in the same category; that is to say, upon all persons who stand in the same relation to the law, in respect to the privileges and immunities conferred by it, or the acts which it prohibits."

I claim that, as a matter of law, the classification of subjects to be taxed is conclusive, subject only to the principle that all of the same class shall bear equal burdens, and that no violence be done to the cardinal principles of a free government.

In connection with this subject of classification, I desire to discuss what is known as the reserved power.

Under the Constitution of 1849 and the Constitution of 1879 there is a reserved power to alter and repeal the charters of corporations. It is claimed, however, that as railroad corporations can be formed under the Constitution

of California only under general laws, and as general laws may be altered and repealed from time to time without any reservation, a succeeding Legislature having as much power as a preceding one, that this reserved power amounts to nothing at all. In other words, that its insertion in the Constitution is a mistake—a meaningless, glittering generality. I deny the premises. The founders of those Constitutions, in respect to this matter, not to say that they builded better than they knew, built with full knowledge and because of their knowledge. I have read with very little profit the decision in the Dartmouth College case, if the chartered privileges of that corporation could be taken away by any general law. They were protected, and declared protected, under the clause against contractual impairment in the Constitution of the United States. It was suggested by Judge Story that this difficulty might in the future be avoided by an insertion in the State Constitutions of this reserved power. The States were quick to adopt this suggestion, and I presume in almost every State Constitution this reserved power stands forth in bold relief. It never occurred to the framers of those Constitutions that this was a mistake, a meaningless form, or an empty symbol.

This reserved power has virtue; and were it not inserted in State Constitutions, the charters of private corporations could not be taken away at the whim and caprice of State Legislatures. But it is claimed that even if all this is admitted, still this reserved power, although existing at the time of the adoption of the Fourteenth Article of Amendment, is overridden by the provision therein against denying the equal protection of the laws, and that, therefore, there is no parallelism between the two cases. Here I must deny the premises again, that it does so override; that the equality clause affects the subject of taxation; but admitting, for the sake of the argument, that it does affect this subject, yet the conclusion that there is no parallelism between the two cases is a *non sequitur*.

In the one case there was the provision against impairing the obligation of a contract. In the cases at bar it is assumed there is a provision against denying the equal protection of the laws.

How is it that the provision in the Constitution of the United States against impairing the obligation of a contract can be avoided by the reserved power, and the provision against denying the equal protection of the laws, so far as it affects taxation, cannot be avoided by this same reserved power? And to put the matter in a stronger light, this reserved power in the former case was inserted in State Constitutions long after the provision was inserted in the Constitution of the United against impairing the obligation of a contract, more than a quarter of a century after, while the reserved power in the latter case was contained in the Constitution of California sixteen years before the equality clause was a part of the Federal Constitution. How is it that one part of the Constitution can retroact and affect State legislation while another part cannot, although it is claimed that both operate by way of limitation on the States?

But it may be claimed that the reserved power became a part of the contract as much as any other part of the contract. So when California gave a charter to the Central Pacific Railroad Company, the reserved power was equally a part of that contract. Is the Fourteenth Article of Amendment retroactive, and so all-powerful as to override another constitutional provision of equal dignity—that against impairing the obligation of a contract?

Or, again, suppose such a reserve power should be inserted in a State Constitution after the adoption of the Fourteenth Amendment, is it not affording the equal protection of the laws in matters of taxation, for I am speaking of taxation, for a corporation voluntarily to take its charter, giving it certain immunities and privileges on condition that it shall be controlled by the State in respect to

the amount of taxes which it shall pay in consideration of such immunities and privileges? Is there anything unequal in that? The corporations may be formed under general laws, but they cannot be compelled to become corporations; and any and all persons may form themselves into corporations. Still it will be claimed that this reserve power must act in the way of general laws only, and cannot act in special cases; that local and special laws are inhibited by the Constitution of California in certain enumerated cases, one of which is in the matter of assessment and collection of taxes.

But the Supreme Court of California has said, it is sufficient to say, that the Legislature has not passed any local or special law in respect to the assessment of taxes of railroads running into more than one county.

It says, in effect, that such assessment is by virtue of a provision of the Constitution itself, and not an act of the Legislature.

Then it will be claimed that the Constitution itself is special on this subject, and denies the equal protection of the laws. But the provision is a general provision, affecting all of a class, all railroads which run into more than one county; and the mortgages which are not made an interest in real estate are all of one class—that is to say, the mortgages of property belonging to railroad corporations. The constitutional provision is not local or special.

We have distinctly disclaimed any classification which is purely arbitrary, which is not founded on reason or justice, or the inherent nature of the property, or which violates the principles which underlie all free governments, as my learned associate, Judge Wilson, has so well said. The differential demarkation between a private person and these railroad corporations is well-defined. They have the power of eminent domain, which no private citizen has, or can have, except for a public purpose; the power of perpetual succession when not limited, which no private

citizen has; their property is affected with a public use, and subject to State or governmental control in their rate of fare and freight. They are entitled to exclusive possession of their track, are not amenable to the ordinary police laws, such as rate of speed, and then stockholders are subject to only a limited liability. Congress itself endows some with more immunities and privileges than others. And ecclesiastical corporations in English history at times became so powerful and monopolizing that an act of Parliament, or the fiat of a king, has been resorted to shear them of their privileges. We are not contending, however, that their vested rights can be interfered with. In this respect they are protected, and deservedly so, by the same sanctions which protect all property.

There is another significant reason, already alluded to, for this classification. The segregation of mortgaged property into distinct interests is not practicable as to them. It is practicable as to other persons, and the segregation as to them has been commended as the very perfection of equity and fair dealing. All duplicate taxation is avoided. The two interests constitute only one property, and the owners of the two interests are assessed relatively to the value each has in the property. Now, is this manifestly fair system, which is applicable to so large a class in the State, to be defeated because, owing to exceptional circumstances, this same method of adjustment is not practicable as to a few corporations? Or, on the other hand, must the same system be adopted as to them also, and thereby the revenues of the State be diminished, and a vast amount of property escape the common burden, in endeavoring to effectuate a symmetry which is Quixotic, and which would nullify the constitutional mandate that all property shall be taxed in proportion to its value? Does the equality provision in the Fourteenth Amendment demand something which would produce a manifest inequality? Does not this differential demarkation of itself establish a class?

It is conceded that the mortgages of some, if not all, of these defendants far exceed the assessed value of their roads; and I argue, therefore, that the present system of taxing them is no more onerous than it would be if the bondholders held segregated interests in the railroad property, for it must be remembered that, even as to natural persons, it is provided "the taxes so levied shall be a lien upon the property and security." If the bondholders did not pay, the property would be good for the tax, and the segregation into interests would not affect the covenant in the mortgage.

For the reasons given, the classification of railroad property by the Constitution of California is eminently proper, and, for the reasons also given, the reserved power as to corporations has been inserted in the Constitutions of so many States.

Here I read from my brief on pages 56 and 57:

"In the case of the County of San Mateo *v.* Southern Pacific Railroad Company, 8 Sawyer, 238, (13 Fed. Rep., page 754,) the proposition which we affirm here as to the operation of this reserved power contained in the Constitutions of 1849 and 1879 of the State of California is fairly stated by the learned circuit justice thus: That as a condition in the first place might impose terms as to how the property of the corporation should be taxed, under this reserved power the State still has the right; that the new Constitution in continuing the Southern Pacific Railroad Company, and other railroad corporations in existence, and at the same time authorizing the taxation of their property upon a different valuation, imposes that condition upon them, and that the subsequent exercise of its franchises by the corporation implies assent to the condition. But the learned circuit justice took the negative of the proposition, and held that the provisions of article thirteen of the Constitution of California are not conditions upon the continued existence of valid corporations, and that the State possesses no power to withdraw corporations from the Federal guaranties; that their property is protected the same as that of natural persons, and the State can only control the fran-

chise. I have endeavored to show that the preponderance of authorities is the other way, and the learned circuit justice seemed to admit this, for he said:

"'The general tendency of modern decisions is to treat corporations, with this reserved power, as subject at all times to the will of the State as to their rights, powers, and liabilities. Such unlimited control, in some cases, would, indeed, lift them not only out of the protection of the Fourteenth Amendment, but also out of nearly all protection, except such as the legislative pleasure of the hour may permit.'"

But it will be claimed that this reserved power cannot operate, because in the article on corporations in the State Constitution there is nothing on the subject of assessing and taxing railroad corporations in a certain way; that the provisions on this subject are contained in another article on the subject of revenue and taxation. The article on revenue and taxation follows that on corporations consecutively.

Indeed, the article on corporations, section 17, says:

"All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control."

But where is there a better and fitter place for formulating a revenue system, embracing persons and corporations, than in a special article on that subject—the subject of revenue and taxation? And in the thirteenth section of that article complete power is given to the Legislature to effectuate the tax system in the article devised. It says that "the Legislature shall pass all laws necessary to carry out the provisions of this article"

In the case of Tomlinson *v.* Jessup, cited in my brief, the Court says:

"The original corporators, or subsequent stockholders, took their interest with knowledge of the existence of this power (the reserved power), and of the possibility of its

exercise at any time, in the discretion of the Legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise, if the public interest should at any time require such interference."

Again:

"Immunity from taxation, constituting in these cases a part of the contract with the Government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the Legislature may deem it expedient for the public interests that the revocation shall be made."

This decision was rendered in 1872. There are a number of other well-considered opinions cited in my brief to the same purport. Now, if some corporations have immunity from taxation, and may still be taxed because of the reserved power, why is it that, where they have no immunity, they may not be taxed under the same power in some way different from other persons or corporations? Why is not the reserved power as potent in the one case as in the other? They are deprived of a privilege in the one case, and deprived of a privilege in the other case.

The system of general laws, or laws covering all of a class, is conspicuous in the Constitution of California. In the first Constitution there was an exception in this respect as to municipal charters; but in the second Constitution this exception is eliminated, and now municipal corporations, like private and other corporations, are formed under general laws. To carry out this provision in the second Constitution, I had the honor, as chairman of the committee on cities and towns in the State Senate, in 1883, to report such a classification, and under this classification all cities and towns are distributed into six classes, the law prescribing their powers and duties.

Again, in section 1, article 13, of the Constitution, it is

provided, in effect, that all property shall be taxed, except governmental property and growing crops. Growing crops were exempted, because, in certain sections of the State, from a deficiency of the rain-fall, it is all problematical as to realizing a crop. This is notably so in the southern part of the State, where it is often the case that a good crop is not realized more than once in three years.

It is apparent, therefore, that the idea which pervades the Constitution is that the laws shall be as general as possible. It may be said to be exceptionally so under the California Constitution.

It is further claimed that the State has erred in the matter of classification in another respect: That in the case of corporations such as defendants, the privilege to be heard in respect to the correction of assessments is denied—a privilege which is accorded to other corporations and to natural persons; and in this way defendants are denied the equal protection of the laws.

Here, again, I cite the following from the Kentucky Tax Cases:

"But in case of railroad property, no Board has authority to increase the original assessment made by the Railrail Commissioners, and there is, therefore, no case for an appeal similar to that of the owner of ordinary real estate. *But were it otherwise, the objection would not be tenable.* We have already decided that the mode of valuing railroad property for taxation under this statute is due process of law. That being so, the provision securing the equal protection of the laws *does not require, in any case, an appeal, although it may be allowed in respect to other persons differently situated.* This was expressly decided by this Court in the case of Missouri *v.* Lewis, 101 U. S., pp. 22, 30."

But I will have more to say on this subject in referring to defendants' contention immediately following.

Another contention of the defendants is, that section 10 of article 13 of the Constitution of California violates the Fourteenth Amendment, in not providing for an opportunity

for parties to be heard before the State Board of Equalization in defense of their rights, and that due process of law is not accorded to them.

The Supreme Court of California has held in the case of San Francisco and North Pacific Railroad Company *v.* The State Board of Equalization that this section is self-executing, and that there is a sufficient mandate contained therein for the State Board of Equalization to assess the franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county at their actual value; but in that case the Court says:

"It may be admitted that the Legislature may prescribe the mode of procedure, limit the period in each year within which the Board can assess, determine how these records shall be kept, regulate the conduct to any extent which does not detract from their power, nor relieve them of duties which are imposed by the Constitution."

Again:

"If the Legislature fails to regulate the mode, the power and duty is in the State Board of Equalization to assess at the actual value."

I desire again to call the Court's attention to section 13 of article 13, which says: "The Legislature shall pass all laws necessary to carry out the provisions of this article."

This gives the Legislature full power to regulate the mode of such assessment, to give an opportunity for a hearing to such corporations as defendants, and to complete all proper machinery to insure a fair assessment of their property.

In the case of the County of San Mateo *v.* The Southern Pacific Railroad Company, the learned circuit justice said:

"We have no doubt that further legislation might have been adopted providing for notice to the company, and a system of procedure by which it might have been heard respecting the assessment. We do not understand that

the Supreme Court of the State intended, by the decision cited, to hold that the tenth section of the thirteenth article is self-executing, except to the extent that it vests the complete power in the State Board to make the assessment of the property—not that legislation may not be had providing for the mode in which the power of the Board shall be exercised. Indeed, the concluding section of the article authorizes any legislation necessary to give effect to its provisions. Unfortunately, no such legislation has been had."

But if there was such failure of legislation, it was afterward amply supplied; and section 3665 of the Political Code as amended on March 9th, 1883, on which day it came into effect, provides, among other things, as follows:

"If the owner of a railway assessed by the State Board of Equalization is dissatisfied with the assessment made by tho Board, such owner may, at the meeting of the Board, under the provisions of section 3692 of the Political Code, between the third Monday in August and the third Monday in September, apply to the Board to have the same corrected in any particular, and the Board may correct and increase or lower the assessment made by it, so as to equalize the same with the assessment of other property in the State. If the Board shall increase or lower any assessment previously made by it, it must make a statement to the county auditor of the county affected by the change in the assessment of the change made, and the auditor must note such change upon the assessment-book or roll of the county, as directed by the Board."

One of the duties of the Board under the provisions of section 3692, above referred to, is: "To meet at the State Capital on the third Monday in August, and remain in session from day to day (Sundays excepted) until the third Monday in September."

Besides all this, it is further provided in section 3664 of the Political Code, as amended, which went into effect March 9th, 1883, that—

"The president, secretary, or managing agent, or such other officer as the State Board of Equalization may desig-

nate, of any corporation, and each person, or association of persons, owning or operating a railroad in more than one county in this State, shall, on or before the first Monday in April of each year, furnish the said Board a statement, signed and sworn to by one of such officers, or by the person or one of the persons forming such association, showing in detail for the year ending on the first Monday in March in each year"—

Certain statistical information concerning such railroad, the object evidently being to acquaint the State Board of Equalization with all the facts, so as to enable that Board to make a proper assessment; and it is further provided that—

If such statement is not furnished as above provided, the assessment made by the State Board of Equalization upon the property of the corporation, person, or association failing to furnish the statement is conclusive and final."

Now, in the light of all the authorities, this is due process of law. This sworn statement was filed with the Board in case No. 664.

In the State Railroad Tax Cases the Court says:

"The Board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong, and in the business of assessing taxes this is all that can be reasonably asked."

In Hagan *v.* Reclamation District it is said:

"The officers in estimating the value act judicially, and in most of the States provision is made for the correction of errors committed by them through boards of revision or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is *due process of law.*"

To the same effect are the cases of Pacific Hotel Company *v.* List *et al.*, and that of Missouri *v.* Lowell Hotel Company, cited in our brief.

But this is not all. Section 3669, as amended, which took effect March 9, 1883, provides:

"Any corporation, person, or association dissatisfied with the assessment made by the Board, upon the payment of the taxes due upon the assessment complained of, and the five per cent. added, if to be added, on or before the first Monday in February, and the filing of notice with the controller of an intention to begin an action, may, not later than the first Monday in February, bring an action against the State treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied in whole or in part."

And it is further provided that—

"If the final judgment be against the treasurer, upon presentation of a certified copy of such judgment to the controller he shall draw his warrant upon the State treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected; and the cost of such action, audited by the Board of Examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated," &c.

Nor is this all. In the Kentucky Tax Cases, where it was necessary to bring a suit to enforce the collection of the taxes, just as in the cases at bar, the Court says that—

"The judgments now under review were rendered in just such actions, so that we cannot escape the conclusion that there is no ground for the plaintiffs in error to contend that they have been rendered without due process of law."

Another contention of some of the defendants is, that their franchise is a Federal one, and they are the means and instrumentalities of the Federal Government in carry-

ing out the powers granted to that Government, and that all the franchises being assessed, so that they are not discriminable, the whole assessment is null and void on the ground that the Federal franchise and such means and instrumentalities are not assessable. This is not claimed, however, in cases Nos. 662 and 663—The People, &c., *v.* The Northern Railway Company and The People *v.* The California Pacific Railroad Company,

The Central Pacific and the Southern Pacific Railroad Companies are California corporations. The Supreme Court of California has decided in the case of The Central Pacific Railroad Company *v.* The State Board of Equalization that the franchise is properly subject to State taxation. Section 1 of article 13 of the State Constitution, in enumerating the different things which shall constitute property, mentions franchises, and section 10 of the same article says that the franchise, roadway, &c., of all railroads operated in more than one county shall be assessed by the State Board of Equalization. In the case of Thompson *v.* Railroad the Supreme Court says:

"No one questions that the power to tax all property, business, and persons within their respective limits is original in the States, and has never been surrendered. It cannot be so used, indeed, as to destroy or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in Government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection. We perceive no limit to the principle of exemption which the complainant seeks to establish. It would remove from the reach of State taxation all the property of every agent of the Government. Every corporation engaged in the transportation of the mails, or of Government property of any description, by land or water, or in supplying materials for the use of the Government, or in performing any service of whatever kind, might claim the benefit of the taxation."

In the case of Huntington *v.* The Central Pacific Railroad Company (2 Sawyer) the learned circuit judge said:

"There are two grounds upon which the application for an injunction is rested: First, on the ground that the Central Pacific Railroad is an instrumentality constructed in pursuance of acts of Congress, and employed by the National Government in the exercise of its constitutional powers in providing for the transportation of the mails, the armies of the United States, munitions of war, &c., and, as such instrumentality of the General Government, exempt from taxation."

Omitting the second ground mentioned by the Court, the Court proceeds to say, as to the first ground, that it "has recently been disposed of adversely to the complainants by the Supreme Court of the United States in the case of the Union Pacific Railroad Company *v.* Penniston, Treasurer, &c., decided at the present term, and it requires no further consideration. (18 Wall., 5.)"

In this last case, although the railroad company was incorporated by Congress, yet its property was held liable to State taxation. It does not seem that the Court considered such taxation obstructive of the exercise of Federal powers; and it is safe to conclude that, where, at least, Congress seizes upon a State corporation as the means or instrumentality of exercising its governmental powers, and makes no provision for its exemption from State taxation, the taxing power of the State is not superseded as to franchises of the corporation, and may burden them with taxation.

As said in Porter *et al. v.* R. R. I. & St. Louis R. R. Co., (76 Ill.,) "the franchise of a corporation extends to the entire corporate property, *and it is not possible that it can be divided.* It must, if assessed at all, be assessed as an entirety, and this, as we have already shown, may be in connection with the property to which it is attached."

The Central Pacific and Southern Pacific derived their charter, and, as a matter of course, *their franchises*, from the State of California. If the United States Government has conferred upon them certain privileges, donated to them lands, and otherwise taken them under their protection, this does not operate as a new charter or new franchises. Donations and privileges can be accorded to any one, even private individuals, but franchises are entirely different, and grow out of the corporate character which is given either expressly under the law, or by implication from its provisions, or because of some agency of the State in the exercise of the right of eminent domain. As to these corporations being means or instrumentalities of the General Government, there is nothing to show that the taxation of their property impedes or hinders in any way the Governmental powers which they may be called upon incidentally to execute; and if Congress had thought that such taxation would have had that effect, there would have been inhibition made against State taxation.

In the case of the Railroad Company *v.* Penniston, although the railroad company was chartered by Congress, yet there was no reservation of exemption from taxation in the charter, and it was held that the property could be taxed in Kansas. The charter or franchises were not taxed. But although the railroad company was a means and instrumentality of the Federal Government, the Court did not see fit to exempt it from taxation on this ground or any ground.

I claim that the following citation from Thomson *v.* Paific Railroad, uttered by the eminent jurist who delivered the opinion, and who looks down upon us from these walls, has never been overruled:

"No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the States, and has never been surrendered. It cannot be so used, indeed, as to destroy or hinder the

operations of the National Government, but it will be safe to conclude, in general, in reference to persons and State corporations employed in Government service, that when Congress has not interfered to protect their property from State taxation, such taxation is not obnoxious to that objection."

That decision is direct on this subject of the taxation of instrumentalities of the General Government, which some of these defendants are claimed to be.

As it respects franchises, they have no franchises except such as inure from the State.

I adopt the following views of Messrs. Shellabarger and Wilson on this subject as a part of my argument:

The positions of Mr. Edmunds and of Mr. Evarts, regarding the taxation of the franchises of defendant, which are delivered from the United States, are identical, and are in exact substance this: That since the Constitution and laws of California assume to tax, and, in the case at bar, did tax, "all" the franchises owned by the defendant; and since part of the "faculties" or franchises of defendant, held by the defendant at the date of this assessment, were certain "powers, rights, privileges, and immunities" tendered to defendant by acts of Congress, and accepted by California, are franchises or faculties of Federal creation, and are Federal agencies for executing the functions of the Federal Government (as decided in the Sinking Fund Case, 99 U. S. R.),—therefore, said Federal franchises are not taxable; and having been, in this case, included as an indistinguishable and inseparable part of the present tax assessment, therefore the whole tax is void.

And it is further urged that, because this is a tax upon a Federal franchise or faculty, and not a tax upon tangible property, it is not a tax coming within the law of Railroad Co. *v.* Penniston, 18 Wall., 5, and other like cases.

Now, with very great and unfeigned respect for the learned counsel who urged these views, taking this alleged

Federal franchise tax out of the principles laid down in cases like said case of Railroad Company *v.* Penniston, we submit that the reply to their position is plain and conclusive.

They are enabled to get, and do get, this alleged Federal franchise within this assessment only by virtue of the fact that said franchise is property, and is so defined by section 1, article 13, of the Constitution. It is therefore assumed, by the other side, that said powers, rights, franchises, and privileges, so held under said acts of Congress, are strictly and technically property "capable of private ownership;" and thus alone it is that defendant's counsel are enabled, as already remarked, to prove that said rights, derived from acts of Congress, have been included in this assessment, to wit, by insisting that they are technically and literally "property."

Being confessed, therefore, to be "property," whose property is it, to wit, said alleged Federal franchise?

Now, this Court has repeatedly and explicitly held that, even in the case of the Union Pacific Railroad Company, though chartered by the United States, yet all its property, of every description, is private property, and it a private corporation.

In United States *v.* U. P. R'y Co., 98 U. S., 619, the Court says:

"Railroad *v.* Penniston (18 Wall., 5) shows that the company is not a mere creature of the United States, but that, while it owes duty to the Government, the performance of which may, *in a proper case, be enforced, it is* still a *private* corporation *the same as other railroad companies*, and like them subject to the laws of taxation and the other laws of the States in which the road lies, so far as they do not destroy its usefulness as an instrument for Government purposes."

In Railroad Co. *v.* Penniston (18 Wall., 32) this Court, on the same point of the ownership of all their property by

these companies of the Pacific Railroad system, uses the following language.

Speaking of acts of Congress relating to this railroad system, this Court uses these words:

"They all look to a purpose of Congress to secure an agency competent, and under obligations to perform certain offices for the Government. Notwithstanding this, the railroad and telegraph line are neither in whole nor *in part* the property of the Government. The ownership is in the complainants, a private corporation, though existing for the performance of public duties. The Government owns none of its stock; and although it may appoint two of the directors, the right thus to appoint is plainly reserved for the sole purpose of enabling the enforcement of the engagements which the company assumes—the engagements to which we have already alluded."

"Admitting, then, fully, as we do, that the company is an agent of the General Government designed to be employed, and actually employed, in the legitimate service of the Government, both military and postal, does it necessarily follow that its property is exempt from taxation?"

The Court then proceeds in an elaborate answer in the negative to this question, and holds that all the property of the corporation, except on the franchise or right to *exist* (p. 37), is taxable by the States. And remember that here the right to *exist* is not pretended to be of Federal origin. The exact line of division between those instrumentalities and faculties of the Federal Government which this Court holds not taxable, as pronounced in Osborn *v.* The Bank, and the property of the agents of the United States which are taxable, according to the decisions of this Court, is in this Penniston case most carefully and clearly drawn. On page 36 the Court states this division line, holding that it is found in the fact that the State tax may be imposed upon the property of a governmental agent; and a tax upon the *action* of such agent, or upon the right to be such agent, cannot be imposed by the State.

The Court says:

"This distinction, so clearly drawn in the earlier decisions, between a tax on the property of a governmental agent and a tax upon the action of such agent, or upon his right to be, has ever since been recognized."

Again, in further enforcement of this line of division, the Court says (bottom of p. 36, top of p. 37):

"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. *A tax upon their property has no such necessary effect.* It leaves them free to discharge the duties they have undertaken to perform. A tax upon their *operations* is a direct obstruction to the exercise of Federal powers."

Such is the holding of this Court in cases where the franchise to be a corporation, such as the Union Pacific, is derived directly from the United States, as well as in the case of the Kansas Pacific, chartered by the State. The exact truth is that, for the purposes of the present point, as to the right to tax the faculties or franchises held by the company from the Government, there is outside of the right to be, and which is not here involved, no distinction between a faculty or franchise held by the company from the Government under an ordinary commercial contract and one held by a contract embodied in a legislative charter. Each and both of these two species of contracts are technically and strictly contracts, and nothing different or more—so held from Dartmouth College to this day. The ordinary commercial contract by which the Government contracts with a railroad company, a stage company, a steamboat line, or a ship line for transporting the mails, for a period

of years, at agreed compensation, confers upon the company contracted with what defendant's counsel call in this case a "faculty" or "franchise," precisely in the same sense, and in the same degree, as is conferred by a charter contract. Such ordinary commercial contract by the Government is inviolable precisely in the same sense as a charter contract is. (Sinking Fund Case, 99 U. S., 718, 719.)

Such commercial contract adds value to all the property of the steamboat or other company precisely as it would if the same contract were contained in a Federal charter.

All these things being palpably true, it results that, if a tax cannot be imposed upon the defendant's property in this case, including in that property the increased values that come from its holding the right to transport the United States mail, &c., then it plainly and conclusively results that no steamboat company, stage company, ship company, or other company holding an ordinary commercial contract for carrying the mails can be taxed by the States upon the value of the property held by such companies, as such value is augmented or increased owing to the franchises or contract rights held by it from the Government.

It is precisely this reduction to the absurd which is found strongly and clearly embodied in the opinion of this Court in the Penniston case. Both by the nature of the subject-matter and by the express provision of section 10, article 13, of the Constitution of California, this increased value of the property of the company which comes from its holding the said Federal rights, franchises, and contracts is incapable of being separated, for purposes of tax assessment, from the body of the tangible property of the company. This increased value is really the Federal franchise, and an inseparable part of the property which must be assessed as a unit.

To say, therefore, that, in making assessments of the tangible property of the defendant, the board must first subtract from the present actual value of the property and

franchises, as a whole, the value given to them by this right to transport, for the Government within the State of California, and without the State of California, is most manifestly to reduce this tax system of California to the palpably absurd, and to an impossibility of execution; and this is the very absurdity which is combatted in every case, by this Court, where the Court has held the legal impossibility of divorcing the franchises of a corporation from its other property for the purposes of taxation.

I now approach the discussion of a few so-called State questions.

In the Santa Clara Case, decided by this Court in 1866, there was an express finding that fences between the roadway and coterminous properties were assessed. There was nothing left for inference, but the finding was direct and explicit; and there was a finding, also, as to the value of the fences. Under these circumstances, the Court proceeded to pass upon this State question.

But if there is any finding in any of these cases at bar that fences or steamers were assessed by the State Board, except in case No. 1,157, it is only an inferential one, and I claim that the other findings of fact show that no fences or steamers were assessed, and that such an inference is not a proper one.

Here I quote from my brief on pages 83, 84, 85, 86, and 87:

"In No. 660 the defendant in error is the same as in No. 664, and Finding 1, Record, p. 39, expressly says that the State Board of Equalization 'assessed the franchise, roadway, road-bed, rails, and rolling-stock of the defendant in the sum of eighteen millions of dollars; that the Board apportioned the assessment as alleged in plaintiff's complaint.' Copies of the 'Record of Apportionment' and the 'Record of Assessment of Railways' are embodied in, and made a part of, this finding. From these records, it is apparent that only 602.22 miles of this railroad of the Central Pacific Railroad Company were assessed, and the defendant, in its answer, admits that that is the total length

of its road in the State of California. (Record, folio 19.) It is further apparent that the defendant could not have been assessed for the five miles across the Bay of San Francisco.

"Record, page 41, folio 111, says:

"'The State Board of Equalization being in session on this the 18th day of August, 1883, all the members being present, and having under consideration the assessment of the franchise, roadway, road-bed, rails, and rolling-stock of the Central Pacific Railroad Company within the State for the year 1883, and it appearing to this Board that said company, on the first Monday in March, in the year 1883, at 12 o'clock meridian of that day, owned, and still owns, 602.22 miles of railroad within this State, which at said time and day in March was, and still is, operated in more than one county, being the entire railway of said company within this State, and which, with the right of way for the same, is described as follows: [*'Giving the description, which shows clearly that the distance across the bay was not assessed, and that no steamers were assessed.' After giving this description, it is added:*] And it appearing that the actual value of the franchise, roadway, road-bed, rails, and rolling-stock of said company within this State at the said date and time in March was, and still is, the sum of eighteen million dollars: Therefore it is ordered that the said franchise, roadway, road-bed, rails, and rolling-stock of the said Central Pacific Railway, for the year 1883 be, and the same are hereby, assessed to the said Central Pacific Railroad Company at the sum of eighteen million dollars.'

"The foregoing is taken from the State Board of Equalization's Record of the Assessment of said company. Referring to this same assessment, Finding 15 says: 'Said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based, and no other assessment that (than) the aforesaid was ever made of said property, or any part thereof, for said fiscal year.' The fact that immediately following the above it is added, 'said assessment included all property and kinds of property mentioned in section 3665 of the Political Code of California, as amended March 9, 1883, except depots, stations, shops, and buildings erected upon the space covered by the right of way, which last mentioned property was assessed, as provided in said section, by local assessors,' does not raise a presumption of fact that there were any

steamers, simply because the word 'steamers' occurs in section 3665, there being nothing whatever in the findings to show that there were any steamers in fact; and if a fence is a building, as we claim it is, then it appears that the buildings (fences) erected upon the space covered by the right of way were assessed by the local assessor, and not by the State Board of Equalization.

"The words 'fences,' 'steamers,' and 'distance across the Bay of San Francisco' do not appear at all, or any of them, in the findings, except in case No. 1157, nor in the Record of Apportionment, nor in the Record of Assessment of Railways by the State Board of Equalization.

"Section 3665 of the Political Code mentions steamers which are engaged in transporting passenger and freight cars, not all steamers, and there is nothing in these findings, in the first place, to show that defendant had any steamers, or, in the second place, that, if it had, the steamers were engaged in that kind of transportation. Unless they were actually engaged in that kind of transportation, they are not mentioned as property for the purposes of assessment, or any other purpose in said section. The franchise, roadway, road-bed, rails, and rolling-stock are all mentioned; indeed, we cannot conceive of a railroad without these different constituents entering into the conception, but we can conceive of a railroad without steamers.

"The Constitution itself fixes how steamers should be assessed—section 10, article 13. It was not necessary that they should be mentioned in section 3665. In the case of City and County of San Francisco *v.* The Central Pacific Railroad Company, 63 Cal., 467, already referred to, the Supreme Court of California says 'that the assessment of steamers pertained to the local assessor,' under the foregoing constitutional provision. Consequently, so much of section 3665 as requires the State Board of Equalization to assess steamers of a certain description is null and void. This same general language, 'said assessment included all property and kinds of property mentioned in section 3665,' occurs in the next case, No. 661, where the People of the State of California is plaintiff in error, and the Southern Pacific Railroad Company is defendant in error; and yet, as a matter of fact, there were no steamers to be assessed and no intervening waters to be traversed.

"Besides, the certified copies of the 'Record of Appor-

tionment' and the 'Record of Assessment of Railways,' which are incorporated in the findings in some of these cases, are made by the Code *prima-facie* evidence of the assessment, the property assessed, &c. (Section 3670 Political Code.) If steamers had been assessed, or the distance across the intervening waters, and the Court had so found, in a matter of this gravity it would have appeared in the findings clearly and beyond all controversy, for these matters were distinctly alleged and relied upon in the answer, and set forth with minuteness and detail.

"The words 'said assessment included all property and kinds of property mentioned in section 3665 of the Political Code,' which, I believe, occur in all the cases, certainly do not include fences, for the word 'fences' does not occur in section 3665, unless, as we have already argued, a fence is a building, in which case it actually was assessed by the local assessor, as appears clearly from the findings:

"'Said assessment included all property and kinds of property mentioned in section 3665 of the Political Code of California, as amended March 9, 1883, except depots, stations, shops, and buildings erected upon the space covered by the right of way, which last-mentioned property was assessed, as provided in said section, by local assessors.'

"The very general phraseology used in reference to section 3665 cannot control the language all through the findings in cases Nos. 660, 661, 662, and 663, showing clearly that it was the franchise, road-bed, roadway, rails, and rolling-stock which were assessed by the State Board of Equalization, and nothing else. So far as case No. 1157 is concerned, I rely upon the points taken in the brief of Messrs. Shellabarger & Wilson."

To further show that my contention is right, that in none of these cases at bar were either fences or steamers assessed by the State Board of Equalization, I wish to call the Court's attention particularly to No. 661 and finding No. 14. In that case the words *steamers* and *fences* do not occur in the answer at all. In some of the other cases they do occur. Yet the finding referred to is in the same general language that the assessment included all property and kinds of property mentioned in section 3,665 of the Political Code, show-

ing clearly that what was meant by this part of the finding is that it included all such property, if the defendant had any such property. It is evident, therefore, that the prior part of the finding must control; that the assessment was made upon the franchise, roadway, road-bed, rails, and rolling-stock.

It is contended, however, that moles and wharves were assessed, but there is no finding that there were any moles or wharves, and section 3,665 speaks of moles and wharves upon which the track is laid, and in the same connection with bridges and culverts. Why do not defendants claim that bridges and culverts are included in the assessment? They certainly are no more necessary than moles and wharves on which the track is laid.

The Supreme Court of California has never decided that such moles and wharves could not be assessed by the State Board of Equalization. They are part and parcel of the road-bed and roadway. The very railroad track itself runs over them. The roadway and road-bed might as well be eliminated from the assessment as the moles and wharves.

On this point I cite San Francisco *v.* Central Pacific Railroad Company, 63 Cal., p. 469, where the Court says:

"The road-bed referred to in section 10, in our judgment, *is the bed or foundation on which the structure of the railroad rests.* Such is the definition given by both Worcester and Webster, and we think it correct. The roadway has a more extended signification as applied to railroads. In addition to the part denominated road-bed, the roadway includes whatever space of ground the company is allowed by law in which to construct its road-bed *and lay its track.*"

I now call the Court's attention to the fact that the present assessment and taxation system of railroads operated in more than one county is upheld by the Supreme Court of California in the case of the San Francisco and North Pacific Railroad Company *v.* The State Board of Equalization, 60 Cal., p. 29, in the case of the Central Pa-

cific Railroad Company *v.* State Board of Equalization, 60 Cal., p. 59, and in the case of People *v.* Sacramento County, 59 Cal., pp. 325 and 326.

Double taxation is not permitted under the present Constitution of California, (Spring Valley Waterworks *v.* Schottler, 62 Cal., 114,) the Supreme Court saying:

"The conclusion is reached that, when the law is complied with by assessing all the property of the corporation, which property includes the franchise of the corporation, to assess the shares would be double taxation, because it would be, in effect, to assess the same property twice for the same tax, *which the Constitution forbids.*"

One of our learned friends on the other side—Colonel Haymond—took the position that, by omitting the words "equal and uniform" from the present taxation *regime*, which words were in the old Constitution, the object is expressed to make taxation unequal and multiform.

The reason that this omission was made is simply this: Because, in the case of The People *v.* Hibernia Bank, 51 Cal., 247, the Supreme Court, speaking through a learned justice—Mr. Justice McKenstry—says:

"There would be a contradiction in the single section of the Constitution (article 9, section 13, of the Constitution of 1849) if it were construed as requiring that *all* property should be taxed equally and uniformly with reference to its value, and that the word *property* includes those things, practically incapable of an appraisement, bearing any definite relation or proportion to other things or property; that causes of action are dependent on too many contingencies to be capable of appraisement which shall accord with any rule of equality or uniformity of value, is too plain for argument."

By that decision "credits" could not be taxed, because of these words "equal and uniform;" but, under the present Constitution, credits are specially mentioned as property subject to taxation, and the words "equal and

uniform" are eliminated, so they may not prevent the compassing of this result.

The discussion on this subject referred to in my brief has nothing whatever to do with the taxation of railroad property, but had reference to the taxation of credits, whether in the hands of natural persons or any one else.

It is claimed, also, that the taxation legislation of California is obnoxious to section 25 of article 4 of the State Constitution, which inhibits the Legislature from passing any local or special law in the following cases: In the matter of regulating the practice of courts of justice and for the assessment or collection of taxes.

Nothing, however, is urged in this connection with regard to the assessment, for that is not by virtue of an act of the Legislature, but is a self-existing mandate of the Constitution. It is claimed, however, that the method of collecting the taxes assessed by the State Board of Equalization against defendants is local and special.

As the brief of Mr. Harvey S. Brown is, on certain cases pending in the Supreme Court of California, referred to by defendants' counsel in this case, I desire to call the Court's attention to page 43 of that brief, in which Mr. Brown, counsel for defendants in the Supreme Court, frankly admits that this point—that the matter of the collection of taxes is local or special—is entirely a new point.

I quote his language:

"It will be observed that all of the above points, save the last one, relate exclusively to the collection of taxes. So far as I am advised, these questions as to the collection of these taxes have never before been presented to, or passed upon by, any Court except the Court below."

The Court below referred to is Judge Levy's Court. Judge Levy is one of the twelve supreme judges of San Francisco, and has been such for the last two or three years. He sustained a demurrer to the plaintiff's complaint, and an appeal has been taken from that decision to

the Supreme Court of California. It will probably be eighteen months before the case will be reached on regular call. I have heard that there is a motion made in the case, or cases, for advancement.

But in the cases at bar no demurrer is shown by this record.

There is nothing in these records to show that, at any time, the defendants claimed that the complaints did not state facts sufficient to constitute a cause of action. And there is a provision in the Code of Civil Procedure of California that all objections are waived except such a want of sufficient facts and the objection to the jurisdiction of the Court, if there is no demurrer to the complaint. Nor do the answers in these cases rely on any violation of section 25 of article 4 in respect to local or special legislation in the collection of the taxes or in the practice of courts of justice.

It is now claimed that the statutory form of complaint is insufficient. It is enough to say that this is pleading, and not practice. Evidence is a matter of practice. We sometimes say that such a thing is a rule of evidence, and not of practice, as in the case of the Statute of Frauds. But, for another and all-sufficient reason, if our objection to the consideration of these new questions at all, is not tenable, there is no virtue in them. Section 13 of article 13 of the Constitution says:

"The Legislature shall pass all laws necessary to carry out the provisions of this article."

The Legislature was authorized to do what was necessary to effectuate the collection of those taxes imposed by the State Board of Equalization, and to formulate it into a law. The Legislature was authorized to say what should be the pleadings in the case, and to formulate that also into a law.

The Legislature has done so under this clause of plenary

power, and an independent provision in another article of the Constitution cannot affect the general subject of revenue and taxation as prescribed in article 13.

I will now endeavor to give a differential summary in respect to the assessment and taxation of the property of such corporations as the defendants, whose roads run into more than one county, and the property of other persons, as prescribed by the Constitution and laws of California.

In the former case, a sworn statement is required to be furnished the State Board of Equalization, which is the assessing board, on or before the first Monday in April of each year, giving in detail the required facts for the year ending on the first Monday of March. If the statement is not furnished, the assessment becomes final. The Board meets at the State Capital, and continues in open session from the first to the third Monday in August to complete the assessment. In the latter case, a sworn statement is also required to be furnished to the county assessor, showing the required facts for the year ending on the first Monday of March. The assessor must complete his assessment book or roll by the first Monday of July in each year. In the former case, between the third Monday in August and the third Monday in September, the owner of a railway assessed by the State Board of Equalization, if dissatisfied with its assessment, may apply to the Board to have the same corrected in any particular, and the Board may increase or lower the assessment, so as to equalize the same with the assessment of other property in the State, the Board thus changing from an assessing board to an equalizing board. In the latter case, after the assessment-book is completed, the clerk of the Board of Supervisors gives notice of the time that the Board will meet to equalize assessments. The Board of Supervisors meet, on the first Monday of July, and sits as an equalizing board not later than the 4th Monday in July, with power, after giving notice as by rule it may prescribe, to increase or lower any

assessment, except such as is to be made by the State Board; but *they are not to lower unless a verified application is filed showing the facts upon which it is claimed.* In the former case, the State Board has the power to appraise their assessments to each of the counties, in proportion to the number of miles of railway laid in such counties, and to transmit the apportionment to the county assessor; this apportionment is to be made within ten days after the third Monday in August, and they must within this time transmit to the county auditor a statement showing the assessed value per mile, and other facts, together with the amount apportioned to the county. In the latter case, the county auditor enters this statement on the assessment-book. On the first Monday in October the Board of Supervisors make an order declaring the number of miles of track, the assessed value per mile as made by the State Board, and the assessed value in each city or lesser taxation district, through which the railway runs, which constitutes the assessed value for such districts, and the clerk of the Board transmits a copy to the authorities of such districts.

And here it should be added that the railway property is taxable upon said assessment at the same rates as the property of individuals.

In the former case, the State Board prepares what is called a "Record of Assessment of Railways" and a "Record of Apportionment of Railway Assessments," and before the third Monday of October must transmit to the controllor duplicates of these records, the record of apportionment, showing amount of taxes due the State, and amount due each of the counties. These duplicates constitute the warrants for the controller to collect the State and county taxes levied upon such property assessed by the Board, and the controller computes the exact amount due from a statement which is to be furnished him by the Board of Supervisors as to the rate of taxation levied by them for county purposes.

Within ten days after the fourth Monday in October the controller is to publish a notice that such taxes are due, and unless paid to the State Treasurer at the State Capitol prior to the last Monday in December, when they become delinquent, five per cent. will be added.

In the latter case, as soon as the auditor receives from the State Board a statement of the changes made by them, he makes the corresponding changes on the assessment-book, and computes the exact amount due, and on or before the fourth Monday in October delivers a copy of the assessment-book, corrected, to the tax-collector. Within ten days after its receipt the tax-collector gives notice that the taxes are due, and if not paid by the last Monday in December will become delinquent, and five per cent. added, stating time and place where payment may be made. In the former case, when taxes are collected, the State's portion is to be distributed by the treasurer to each fund entitled thereto, and the portion belonging to the counties is placed in a fund called "Railway Tax Fund," to the credit of the proper county. In the settlements made with the controller by the county treasurers they get warrants from the collector for so much of the railway tax fund as is placed to the credit of their several counties. After the first Monday of February of each year the controller must bring an action in the name of the people for the collection of such taxes assessed by the State Board as are delinquent, and demands for State and county tax may be recorded in one action.

In the latter case there is a provision for the tax-collector settling with the auditor for all moneys collected for the State or county, and paying the same over to the treasurer. He delivers a delinquent list to the auditor, the auditor charging him with the amount thereof, and within three days thereafter the tax-collector receives the list, duly certified, from the auditor. The tax-collector publishes the delinquent list, and with it a notice that un-

less the delinquent taxes are paid the real property on which such taxes are a lien will be sold at public auction.

I cite the following from the brief of Messrs. Rhodes and Delmas in the Santa Clara case, and adopt the same as a part of my argument.

"There is no ground of complaint here that this property has been subjected to duplicate taxation. It not only is not alleged that the mortgage was assessed, but we say that under the Constitution it is not possible to assess it. The whole of section 4, article 13, must be read together in order to ascertain its meaning. Thus read it is: That a mortgage, deed of trust, &c., except those made by railroad and other *quasi*-public corporations, shall be deemed an interest in the property, &c., and shall be assessed to the owner thereof, &c. Unless the property can be divided as between its owner and the owner of the mortgage, the mortgage is not to be assessed; and there being no provision for such a division in case of railroad corporations, but it being by implication forbidden, there cannot be an assessment of the mortgage upon the property of railroad corporations.

"This is virtually set at rest by the Supreme Court of the State. The first section of article 13 enumerates, as property subject to taxation, stocks. The Legislature, in order to avoid duplicate taxation, provided by the Political Code, section 3640, as amended in 1880, that the value of the shares of the capital stock of corporations shall be ascertained by deducting the whole value of the corporate property from the value of the whole stock, and dividing the remainder by the whole number of the shares.

"In *Burke* v. *Badlam*, 57 Cal., 594, the Court held that the Constitution does not authorize double taxation, and that to assess all the property to the corporation and the shares to stockholders, would be double taxation.

"This doctrine was affirmed in *Miller* v. *Heilbron*, 58 Cal., 134.

"As the whole railroad property is required to be assessed as a unit, and as the Constitution does not permit duplicate taxation, it follows that the mortgage cannot be assessed."

I reply to an inquiry of one of your Honors, in respect to the assessment in the State of California of railroads

running into more than one county, other than railroad corporations, and whether or not their mortgages are deducted, I beg to say that the following are the facts:

That in 1883 and 1884 the railway operated between the city of Marysville and the town of Orsville was assessed to N. D. Rideout and N. Luning, then the owners thereof, and in 1885, 1886, and 1887 to the Northern California Railroad Company, a coporation; that the said Board of Equalization did not, in the assessment of said railway for each of said years, deduct from the valuation of the property assessed the valuation of any mortgage or other liens upon the property, but, on the contrary, the Board assessed each of said years the franchise, roadway, road-bed, rails, and rolling-stock of said railway at its supposed actual value, exclusive of or without deduction of any mortgage or lien upon said property.

That in 1883 and 1884 the railway operated from the town of Santa Cruz, Santa Cruz county, to the town of Pajaro, Monterey county, was assessed to the Pacific Improvement Company, and in 1885, 1886, and 1887 to the Pajaro and Santa Cruz Railroad Company; that the said Board of Equalization did not, in the assessment of said railway in any of said years, deduct from the valuation of the property assessed the valuation of any mortgage or other liens upon the property, but assessed on each of said years the franchise, roadway, road-bed, and rails, and in 1883 and 1884 the rolling-stock of said railway, at its supposed actual value, exclusive of or without deduction of any mortgage or other lien thereon.

In neither of said years was any deduction made by the Board from the assessment of the actual value of the franchise, roadway, road-bed, rails, and rolling-stock of any company or railway made by it on account of any mortgage, trust-deed, or other lien thereon; but that each railway was assessed at its estimated actual value, as if no lien for the security of the payment of money was thereupon.

I now beg to refer the Court to certain provisions in the Civil Code of California in respect to corporations, as my learned friend on the other side, Colonel Haymund, seems to think that there is little, if any, formality in forming them, and that natural persons have nearly, or, in effect, the same identical rights; and also refer to certain provisions in the Code of Civil Procedure in respect to the exercise of eminent domain.

STATUTES AS TO ORGANIZATION OF CORPORATIONS—CIVIL CODE.

SEC. 284. Corporations are either public or private. Public corporations are formed or organized for the government of a portion of the State; all other corporations are private.

SEC. 285. Private corporations may be formed by the voluntary association of any five or more persons in the manner prescribed by this article. A majority of such persons must be residents of this State.

SEC. 286. Private corporations may be formed for any purpose for which individuals may lawfully associate themselves.

SEC. 289. The instrument by which a private corporation is formed is called "articles of incorporation."

SEC. 290. Articles of incorporation must be prepared, setting forth—

1. The name of the incorporation.

2. The purpose for which it is framed.

3. The place where its principal business is to be transacted.

4. The term for which it is to exist, not exceeding fifty years.

5. The number of its directors or trustees, which shall not be less than five nor more than eleven, and the names and residence of those who are appointed for the first year. * * *

6. The amount of its capital stock, and the number of shares into which it is divided.

7. If there is a capital stock, the amount actually subscribed, and by whom.

*

SEC. 291. The articles of incorporation of any railroad, wagon-road, or telegraph organization must also state—

1. The kind of road or telegraph intended to be constructed.

2. The place to and from which it is intended to be run, and all the intermediate branches.

3. The estimated length of the road or telegraph line.

4. That at least ten per cent. of the capital stock subscribed has been paid in to the treasurer of the intended corporation.

SEC. 292. The articles of incorporation must be subscribed by five or more persons, a majority of whom must be residents of this State, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property.

SEC. 293. Each intended corporation named in section two hundred and ninety-one, before filing articles of incorporation, must have actually subscribed to its capital stock for each mile of the contemplated work the following amounts, to wit:

1. One thousand dollars per mile of railroad.

2. One hundred dollars per mile of telegraph lines.

3. Three hundred dollars per mile of wagon-roads.

SEC. 294. Before the articles of incorporation of any corporation referred to in the preceding section are filed, there must be paid for the benefit of the corporation to a treasurer elected by the subscribers ten per cent. of the amount subscribed.

SEC. 295. Before the Secretary of State issues to any such corporation a certificate of the filing of articles of incorporation, there must be filed in his office an affidavit of the president, secretary, or treasurer named in the articles that the required amount of the capital stock thereof has been actually subscribed, and ten per cent. thereof actually paid to the treasurer for the benefit of the corporation.

SEC. 296. Upon filing the articles of incorporation in the office of the county clerk of the county in which the principal business of the company is to be transacted, and a copy thereof, certified by the county clerk, with the Secretary of State, and the affidavit mentioned in the last section, where such affidavit is required, the Secretary of State must issue to the corporation, over the great seal of the State, a certificate that a copy of the articles containing

the required statement of facts has been filed in his office; and thereupon the persons signing the articles, and their associates and successors, shall be a body politic and corporate by the name stated in the certificate, and for the term of fifty years, unless it is in the articles of incorporation otherwise stated, or in this code otherwise specially provided.

EMINENT DOMAIN STATUTES—CODE OF CIVIL PROCEDURE.

SEC. 1237. Eminent domain is the right of the people or Government to take private property for public use. This right may be exercised in the manner provided in this title.

SEC. 1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Fortifications, magazines. * * *
2. Public buildings. * * * (State purposes.)
3. Public buildings. * * * (Counties, cities, &c.)
4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll-roads, by-roads, plank and turnpike roads, steam and horse railroads, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.
5. Roads, tunnels, ditches, flumes, pipes, and dumping-places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.
6. By-road leading from highways to residences and farms.
7. Telegraph lines.
8. Sewerage of any incorporated city. * * *

SEC. 1242. In all cases where land is required for public use, the State, or its agents in charge of such use, may survey and locate the same. * * *

SEC. 1243. All proceedings under this title must be brought in the Superior Court of the county in which the

property is situated. They must be commenced by filing a complaint and issuing a summons thereon.

SEC. 1244. The complaint must contain—1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled the plaintiff.

(The ensuing sections relate to the proceedings, summons, jury, and the like.)

In conclusion, I regret that I could not, owing to a want of time, treat of these subjects more connectedly and more in detail. I thank your Honors for the very kind and patient attention you have given me.

NOTE.—The provisions of the Constitution and Codes bearing on the question of assessment and taxation are set forth in full in my brief, pages 8 to 21, inclusive. Section 13 of article 13 of the Constitution is not printed in the brief, but is in the following words: "The Legislature shall pass all laws necessary to carry out the provisions of this article."—G. A. J.

127-1

IN THE

Supreme Court of the United States.

October Term 1887.—No. 1157.

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

In Error to the Circuit Court of the United States for the Northern District of California.

Now comes the defendant in error in the above-entitled cause and moves the Court here to advance the said cause to be heard in connection with Numbers 660, 661, 662, 663 and 664, already advanced on motion of the plaintiffs in error therein; and for causes and grounds of this motion this defendant adopts, as in the main and for the purposes hereof, merely the matters stated and set forth in the motions of the plaintiffs in error in the cases heretofore advanced and above enumerated, without committing itself to an admission of the accuracy of statement in respect of the matters bearing upon the merits of said causes contained in said motions, but adopting the same for the purpose of show-

ing the great public importance of the causes and of this case and the high desirability for the interests of the people of the State of California and of justice to this defendant that this case should also be heard and disposed of at this time and in connection with the others above named.

This defendant further states that, as will appear from the Record, the great and principal questions involved in this cause are precisely, or at least substantially, the same as those presented in the causes already advanced. This defendant, therefore, asks that the Court advance this cause to be heard in connection with the others, in order that the whole subject-matter, in all its forms, may be now disposed of. And it further humbly submits, that it would be unjust that one in this series of controversies, involving matter so important, both to the people of the State of California and to this defendant, should be held back, while all the others are justly thought by this Court to be of such concern and importance—both in respect of the public and in respect of the recovery of enormous penal interest, &c., if it should happen that the tax turns out to have been legally imposed—as to warrant an immediate hearing. This defendant, therefore, moves that this cause be advanced to be heard in connection with the others above named.

GEORGE F. EDMUNDS,
Of Counsel for the Defendant in Error.

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IN THE

Supreme Court of the United States.

October Term 1887.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs in Error,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY,
Defendant in Error.

No. 664

Motion to Advance.

And now come the plaintiffs in error, by counsel, and move the Court to advance the above-entitled cause, and present the following brief statement of the matters involved, and reasons for this application.

MATTERS INVOLVED.

1st. The plaintiffs in error sued the defendant in error in the Superior Court of the city and county of San Francisco, California, to recover certain sums assessed as taxes for State and county purposes for the year 1885, by the State Board of Equalization, on defendant's franchises, roadbed, roadway, rails and rolling stock in the several counties through which defendant's road passes, specifying in the complaint the amount claimed as State taxes, and the amounts claimed for the several counties for county purposes.

2d. The defendant answered, denying the allegations of the complaint, and denying indebtedness, in this, to wit: That the Central Pacific Railroad Company was organized

in June, 1861, under the laws of California, to construct a road from Sacramento to the eastern boundary of the State, in expectation that it would constitute a part of a line contemplated to be constructed under authority of the United States from the Missouri river to the Pacific ocean; that Congress chartered the Union Pacific Company to construct a part of this line, and adopted the Central Pacific (defendant in error) as the instrument or agent to construct that portion lying in California (the portion assessed); clothed it with the same powers, privileges and immunities conferred upon the Union Pacific Company; made grants of land, &c., to aid in construction, and to secure to the Government the use of the road for postal and other purposes; that the road was constructed, and in connection with the Union Pacific, is operated as a continuous line, and thereby these companies became, and are, the agents of the Federal Government to carry out the purposes of the Government in making said grants; and that the franchise thus held and used is *not subject to State taxation.*

3d. It is further set up, by way of answer, that the defendant in error, for the purpose of constructing the road, borrowed money, and secured the same by a mortgage on the land grant, and on the franchises, railroads and rolling stock; and likewise had a loan of bonds from the United States to aid in construction, for which the United States holds a mortgage on said franchises, roadway, roadbed and rolling stock; that these liens still exist, the indebtedness not having been paid; that under the Constitution and laws of the State of California in making assessments against property owned by natural persons or corporations other than railroad or other *quasi* public corporations, deduction is made of the mortgage indebtedness, but such deduction is not permitted as to property owned by railroad corporations operating roads in more than one county; that in making the assessments in question, no deduction was made, or, by the Constitution of California, permitted, on

account of the mortgage indebtedness aforesaid; and that by reason of this discrimination, the Constitution of California, in this respect, is violative of the 14th article of amendment of the Constitution of the United States, and, therefore, the assessment is illegal and void.

4th. It is further set up by way of answer that under the Constitution of California natural persons and corporations have the right to be heard before the County Board of Equalization in respect of correction of assessments, but that in case of corporations, such as defendant, operating a railroad in more than one county, this privilege is denied, and this, it is claimed, is in violation of the 14th article of amendment.

5th. And in various forms by this answer, the defense is made that the State of California, under its Constitution and laws, in assessing for taxation the property of natural persons, deducts from the value of the property the amount of incumbrances, but does not permit such deductions in case of railroad corporations operating roads in more than one county; that such deduction was not made in this case; and that this discrimination is contrary to the 14th article of amendment.

6th. It is also averred in the answer that section 10 of Art. XIII of the Constitution of California violates the 14th article of amendment, for the alleged reason that said provision of said State Constitution does not provide for any opportunity for parties to be heard in defense of their rights before the State Board of Equalization.

7th. It is also averred that there are railroads in said State, operated in more than one county, owned by individuals, partnerships, and corporations other than railroad corporations, which, under the laws of California, are entitled to deductions in making assessments, and have been allowed such deductions.

8th. In the answer it is alleged that the value of fences and ferry-boats were embraced in the assessment in ques-

tion, but this feature of the case is eliminated, as will hereinafter appear.

9th. That the State Board of Equalization made the assessment in question upon the franchise, roadway, roadbed, rails, and rolling stock; but that the assessment was not made separately on these, but that they were blended together.

Other matters are averred in this answer, but the foregoing presents the main material contentions of the defendant in error.

On motion of defendant, the case was transferred to the Circuit Court of the United States for the district of California, a jury was waived, and the case submitted to the court on a stipulation. (Record, p. 35.)

By this stipulation the "*fence*" feature of the case was removed from it, and the averment in the answer as to ferry-boats being included, is negatived in the finding of facts. (Record, p. 41, Finding XXI.)

10th. The court, in substance, made the following findings of fact:

(*a.*) That the State Board of Equalization assessed the property of defendant and apportioned the same as set out in the complaint.

(*b.*) That defendant is a corporation existing under the laws of California, except so far as its organization, existence, and character may be affected by Federal or State statutes referred to in the findings.

(*c.*) That in making the assessment, the franchises, roadway, roadbed, and rolling stock were blended together, and not separately assessed.

(*d.*) That in making the assessment, no deduction was made on account of the mortgage indebtedness above referred to.

(*e.*) That under the Constitution of California, property of natural persons, and of corporations not *quasi* public, such deductions are provided for and made, but in case of

corporations such as the defendant, such deductions are not permitted, and were not made in case of the assessment in question.

(*f.*) That under the Constitution of California, the owners of property, except such as that of the defendant in this case, have the right to apply to a county board for correction of assessments, and to have a hearing before such board, but such right is denied in respect of property such as is involved in the assessment in question.

(*g.*) That the power conferred by the State Constitution on the State Board of Equalization, to which board is committed the assessment of property of railroad corporations operating roads in more than one county, does not provide for parties to be heard in defense of their rights.

(*h.*) That there are railroads operated in more than one county owned by partnerships, individuals and corporations other than railroad corporations, and as to which, in making assessments, deductions of mortgage liens, are, by the laws of California, authorized to be made, and have been made.

Also, that by the laws of California, private corporations are authorized to be created for any purpose for which individuals may associate themselves together, such as insurance, operating railroads, wagon roads, manufacturing, etc., which under the laws are allowed these deductions, although denied to such corporations as defendant.

The court below adjudged that defendant was not indebted.

These findings seem to have been specially prepared to present, and they do present, to the Supreme Court of the United States the questions—

1st. Is the property of this corporation subject to taxation for State and county purposes?—the defendant contending that it is not, because of its relations to the Federal Government.

2d. If it is subject to taxation, must the mortgage in-

debtedness be deducted from its value?—the defendant contending that it must be deducted.

3d. And involved in these questions, and largely affecting, if not entirely controlling them, the question: Does the provision of the Constitution of the State of California, which permits deductions as to property of natural persons, and does not permit such deductions as to property of railroad corporations whose roads extend to more than one county, violate the 14th article of amendmant?

4th. Is the 14th article of amendment violated by the Constitution and laws of California in that the latter makes provision for a hearing before county boards for correction of assessments in case of natural persons, &c., but does not make provision for corporations such as the defendant in error?

5th. Is the 14th article of amendment violated in that the Constitution of California makes no provision for according parties a hearing before the State Board of Equalization in cases such as this?

Reasons for Advancing.

There are six of these cases pending in this court—Nos. 660, 661, 662, 663, 664, and 1157—all involving substantially the same questions.

A glance at the records in this and the other cases above referred to will show (and it is so notorious a fact that the court would probably take notice of it aside from the records) that the value of this kind of property in this State is enormous.

Under the Constitution and laws of the State, the State officials must take into account, and make assessments upon, this species of property in making provision for revenues for State and county purposes.

And under the Constitution and laws these officials cannot make the deductions the defendant is claiming in this case in making the assessments.

They must continue to assess, and without deductions, until it shall have been determined by this court that such property is not subject to State taxation, or if so subject, is entitled to these deductions.

It therefore needs neither illustration nor argument to show that the finances of the State, and provision for its institutions, are seriously affected by delay in getting these questions determined.

In this connection, we beg attention to the affidavits of Hon. John P. Dunn, hereto attached, marked Exhibits "A" and "B," and assign as additional reasons for advancing, the facts therein stated.

The questions involved are the more serious and disturbing because of the extent in value of this class of property. So long as it is treated as taxable, and without deductions, and that tax not paid, there must be a large deficit in revenue.

If it is not subject to such taxation, the State authorities should early be advised of that fact, to the end that rates can be made as to property that is taxable, which will afford the necessary revenue to carry on the State and county affairs.

We especially urge upon the consideration of the Court the fact that the State officials must deal with this matter of assessment in the way pointed out by the Constitution and laws of the State; and, which is still more important, the Legislature of California must, in its enactments, conform to the Constitution of the State until it is conclusively determined, if it shall be so determined, that that constitutional provision and the laws in furtherance of it are in conflict with the fourteenth article of amendment.

It is mainly because the administration of public affairs of this State is so seriously involved in these questions that the Court is respectfully asked to advance this case and the others named.

This particular case is now brought to the attention of

the Court for the reason, as above pointed out, that the matter of the inclusion of the value of fences in making the assessments, which ruled the case of Santa Clara Co. *v.* The Southern Pacific Co. (118 U. S., 394), is not involved in this case; and therefore, as we believe, this record presents for the consideration and determination of this Court the constitutional questions hereinbefore mentioned, which it is so important to the State to have speedily and finally settled.

S. SHELLABARGER.
J. M. WILSON.

Exhibit "A."

In the Supreme Court of the United States.

The People of the State of California, Plaintiffs in Error, *vs.* The Central Pacific Railroad Company.	No. 660.
The People of the State of California, Plaintiffs in Error, *vs.* The Southern Pacific Railroad Company.	No. 661.
The People of the State of California, Plaintiffs in Error, *vs.* The Northern Railway Company.	No. 662.
The People of the State of California, Plaintiffs in Error, *vs.* The California Pacific Railroad Company.	No. 663.
The People of the State of California, Plaintiffs in Error, *vs.* The Central Pacific Railroad Company.	No. 664.

STATE OF CALIFORNIA, *County of Sacramento,* } *ss.*

John P. Dunn, being duly sworn, deposes and says that he is the controller of State of said State of California, and

has been such controller for more than four years last past, and that he is the said John P. Dunn mentioned in the said cause or causes above named; that as such controller the whole financial department of the State Government has been under his immediate supervision, and he finds the following to be the facts in regard to the taxation of railroads in said State:

II.

In the year 1880 the railroad corporations of the State belonging to the Central Pacific and Southern Pacific systems, made default in the payment of their taxes.

Again, in 1881, 1882, 1883, 1884, 1885, and 1886, default was made and suits instituted for the recovery of the sums claimed to be due, and of these the cases involving the taxes of 1883, 1884 (if appealed), 1885 and 1886 are yet to be heard in the Supreme Court of the United States. Of the taxes levied against the said railroad corporations, a portion thereof has been paid by reason of certain compromises entered into between the said corporations and certain officials of the State and county governments. The amounts tendered and paid on account of such taxes have in no instance been of the full amount demanded by the State, but were only of the amount which the representatives of the railroad corporations declared themselves "minded to pay." But no money has been paid on the taxes levied for the years 1885 and 1886.

III.

That of the taxes levied against the said delinquent railroad corporations for the years 1883, 1884, 1885, and 1886, there remains unpaid the sum of $\$1,915,738\frac{25}{100}$, exclusive of any and all claims for interest, penalties, costs, &c., accruing by reason of such delinquency. In addition to this sum must be added the taxes of 1887, which it is estimated will amount to $657,000, making a total of $\$2,572,738\frac{25}{100}$, now dependent on the result of the questions involved in the cases before the court.

IV.

This protracted litigation, extending over a period of six years, and the yearly default in the payment of the taxes

assessed against these railroads, have resulted in the utmost confusion to the finances of the State and counties. This confusion has entered into the affairs of the State and counties, the school districts and the road districts. And deponent says on his information and belief that roads have been neglected and school houses compelled to close their doors before the completion of the school year on account of the failure of the said railroads to pay their taxes. These matters, with the depleted condition of the State and county treasuries, are some of the effects produced by the non-payment of the taxes levied against these corporations. It looks as if the people of the State have been forced to the conclusion that the property of railroad corporations is exempt from the burdens which attach to other property, and is not to be considered in establishing the yearly rate of taxation upon the taxable property of the State, since every effort thus far made by the State to obtain a conclusive determination of the issues involved has met with defeat. As soon as the questions involved in said pending causes are definitely settled by this learned tribunal, then, and not till then, will the State know its rights in these matters, and be able to redress these grievances.

Subscribed and sworn to before me this 23d day of September, 1887.

JOHN DUNN.

J. J. PAULSEEL, [SEAL.]
Dep'ty Clerk, Supreme Court.

Exhibit "B."

In the Supreme Court of the United States.

The People of the State of California, Plaintiffs in Error, *vs.* The Central Pacific Railroad Company.	No. 660.
The People of the State of California, Plaintiffs in Error, *vs.* The Southern Pacific Railroad Company.	No. 661.
The People of the State of California, Plaintiffs in Error, *vs.* The Northern Railway Company,	No. 662.
The People of the State of California, Plaintiffs in Error, *vs.* The California Pacific Railroad Company.	No. 663.
The People of the State of California, Plaintiffs in Error, *vs.* The Central Pacific Railroad Company.	No. 664.

STATE OF CALIFORNIA, *County of Sacramento*, } *ss:*

John P. Dunn, being duly sworn, deposes and says, that he is the controller of State of said State of California, and has been such controller for more than four years last past; that, as such controller, the whole financial department of the State Government has been under his immediate supervision; and that he finds the following to be the facts in regard to the taxes assessed against railroads in said State for the year 1886:

II.

That suits for the recovery of the said taxes were brought against the delinquent railroads, in the Superior Court of

the City and County of San Francisco; that the defendants demurred to the complaint in each of said causes; that judgments for the defendants were rendered on the demurrer, from which the plaintiff appealed on June 30, 1887; that said appeals are now pending in the Supreme Court of this State, and will probably be reached for argument in the next three years.

JOHN P. DUNN,
Controller of State.

Subscribed and sworn to before me this 27th day of September, 1887.

[SEAL] W. C. HENDRICKS,
Sec'y of State.

(27-1)

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California Railroad Tax Cases.

In the Supreme Court

OF THE

UNITED STATES.

No. 664.

People of the State of California,
Plaintiff in Error,

vs.

The Central Pacific Railroad Co.,
Defendant in Error.

Brief on Behalf of Defendant,

BY

CREED HAYMOND.

SAN FRANCISCO:
H. S. CROCKER & CO., PRINTERS.
1887.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 664.

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF IN ERROR,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY,
DEFENDANT IN ERROR.

BRIEF OF CREED HAYMOND, FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This action was brought in the Superior Court of the City and County of San Francisco, State of California, for the recovery of certain County and State taxes, claimed to be due from the Central Pacific Railroad Company, under an assessment made by the State Board of Equalization, upon its franchise, roadway, road-bed, rails and rolling-stock.

The amount claimed is three hundred and seventy-five thousand thirteen and $\frac{47}{100}$ ($375,013.47) dollars.

The case was removed to the Circuit Court of the United States for the District of California, and there judgment was rendered in favor of the defendant.

The case in this Court stands upon the Pleadings and Findings, and all of the questions involved are thereon raised.

The answer puts in issue all the material allegations of the complaint and sets up various special defenses, with the exception of a plea of tender, all of these defenses would have been available under the denials in the answer.

The case made by the pleadings and special findings of fact, is as follows:

On the 28th of June, 1861, a corporation was formed and organized under the laws of the State of California, under the name of the Central Pacific Railroad Company of California. The purpose of its formation was to construct, own and operate a line of railroad and telegraph from the City of Sacramento to the eastern boundary of the State of California.

On the 1st day of July, 1862, the Government of the United States undertook to procure the construction of a line of railroad from the Missouri River to the Pacific Ocean, and to that end, Congress passed an Act, entitled "An Act to aid in the construction of a railroad from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes."

U. S. Statutes at large, Vol. 12, p. 489.

By said Act, certain persons therein named were erected into a corporation, under the name of The Union Pacific Railroad Company, and that corporation was authorized to construct, own and operate a line of railroad and telegraph from the Missouri River to the western boundary of Nevada Territory. By this Act, the more certainly to secure the completion of the road, Congress authorized the Central Pacific Railroad Company of California to construct a road on that part of the route which lay between the Pacific Ocean and the eastern boundary line of the State of California, and conferred upon that corporation the same powers and clothed it with the same privileges and immunities which it conferred upon and clothed The Union Pacific Railroad Company with.

On the 2d of July, 1864, Congress passed another Act amending the Act of July, 1862, and granting additional aids and authorizing the Central Pacific Company to build east of the California State line and until it met the line of the Union Pacific.

The declared intent and purpose of Congress in passing these Acts, was to secure the completion of a railroad from the Missouri River to the Pacific Ocean and to secure the use thereof for all time to come to the Government of the United States for the transportation of its mails, public stores, troops and munitions of war, and to require said line, so far as the public and the Government was concerned to be operated as one connected, continuous line.

In 1870, the Central Pacific Railroad Company of California and the Western Pacific Railroad Company

formed themselves into one corporation under the name of The Central Pacific Railroad Company.

The Central Pacific Company constructed a line of road from the City of Sacramento to a connection with the Union Pacific Railroad at a point near Ogden in the Territory of Utah. Both companies complied with the several Acts of Congress and there is now in operation a continuous line of railroad from the Missouri River to the Pacific Ocean.

When the present action was instituted against this company, and at the time the assessment in question was made, the United States had, and now have a lien created by the Acts of Congress of 1862 and 1864 of about twenty-seven millions of dollars, with a large amount of interest upon its rolling-stock, fixtures and franchises; and there are also outstanding bonds of about the same sum, issued by the company prior to January the 1st, 1875, and secured by a mortgage upon the same property. There was also at that time, and still is, a mortgage upon the lands granted in aid of the road. These lands are not, and have never been, in any way connected with the railroad business of the defendant. They are agricultural and grazing lands, held, owned and used for farming and grazing purposes. All of these lands, to which they had obtained title, were in the years 1880, 1881, 1882, 1883 and 1884, assessed by the Assessors of the respective counties in which they were situated at their full cash value; and no deduction from said value was made or allowed, on account of the mortgage or the indebtedness secured thereby. On the contrary, the

laws of the State of California, under which the Assessors acted in making such assessments, prohibited making any deductions from said values, on account either of the mortgages or the indebtedness secured thereby. In each of said years, the defendant paid in full at the time the same became payable, all taxes levied upon said lands, amounting in the aggregate for State, County, and Municipal purposes, to over one hundred and thirty thousand dollars.

The laws of the State of California, then and ever since in force, provide that in the assessment and valuation of lands of like character and situation, and in every respect similar both in quality and use, not owned by railroad or other quasi-public corporations, a mortgage thereon by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, and that in the assessment and valuation of such property for the purposes of taxation, the value of said mortgages shall be deducted therefrom, and the owner of said lands or property only assessed and taxed for the value in excess of the value of the mortgage.

From the findings it appears, that on the 15th day of August, 1885, the State Board of Equalization (folio 110) made a pretended assessment for the purposes of taxation, for the fiscal year of said State, then next ensuing, upon the franchise, roadway, road-bed, rails and rolling stock and *property* of said railroad, against defendant.

This assessment was not made separately upon the franchise, roadway, road-bed, rails and rolling-stock or any properties of said railroad, but all of said properties were blended. This is the assessment upon which the several taxes mentioned in the complaint were based. This assessment included all property and kinds of property mentioned in Section 3665 of the Political Code of California as amended March 9th, 1883, except depots, stations, shops and buildings erected upon the space covered by the right of way, which last mentioned property was assessed as provided in said Section by the local Assessors, and except steamboats.

Section 3665 of the Political Code of California, as amended March 9th, 1883, provides among other things: That the State Board of Equalization must meet at the State Capitol on the first Monday in August and continue in open session, from day to day, Sundays excepted, until the third Monday in August. At such meeting the Board must assess the franchise, roadway, road-bed, rails and rolling-stock of all railroads operated in more than one county. Assessment must be made to the corporation, person or association of persons owning the same *and must be made upon the entire railway within the State and must include the right of way, bridges, culverts, wharves and moles*, upon which the track is laid and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road.

The depots, stations, shops and buildings erected upon the space covered by the right of way are assessed by the Assessor of the County wherein they are situated.

The assessment involved in this case included all the property and kinds of property mentioned in Section 3665 of the Political Code, except depots, stations, shops and buildings erected upon the space covered by the right of way, which last mentioned property was assessed as provided in said section by the local assessors and except steamboats.

(Finding 21, folio 111.)

The assessment in question included not only the franchise, the roadway, the road-bed, rails and rolling-stock of the company, but also included wharves and moles upon which the track was laid.

Section 10 of Article 13 of the State Constitution of California provides that all property except the franchise, roadway, road-bed, rails and rolling-stock of all railroads operated in more than one County in the State shall be assessed in the county, city, city and county, town or township, or district in which it is situate in the manner prescribed by law.

The laws of the State prescribe that all property, except that above mentioned, shall be assessed in the county in which it is situate, by an Assessor elected by the people of such county.

The pretended assessment made by the State Board of Equalization, and the tax claimed is upon all of the franchises, the existence and operation of defendant, and upon all the franchises and corporate powers held and exercised by defendant, as well as its right to exist and to operate.

(Finding 30, folio 120.)

It is also found, Finding 22, folio 111, that the State Board of Equalization in making such assessment pretend to assess to and against the defendant, the full cash value of said railroad, roadway, road-bed, rails, rolling-stock and franchises, as described in section 3665, without deducting therefrom the value of the mortgages or any part thereof, given and existing thereon.

And again, folio 112, that the State Board did not treat said mortgages as an interest in the property, but assessed the whole value of the property to the defendant, in the same manner that it would have done, had there been no mortgage thereon.

From the answer it appears (folio 51-52) that on the 10th of December, 1885, the defendant, while then denying all liability upon the pretended assessment, tendered and offered to the plaintiff the sum of two hundred and twenty-five thousand and eight dollars and eight cents ($225,008.08) in United States gold coin, in part payment of the tax claimed, with an agreement, that the receipt of such sum should not prejudice the plaintiff in any legal rights. And defendant brought the same into court and offered the same to the plaintiff and subjected the same to such orders or judgments as the Court might make in the premises.

The special grounds of defense made by the defendant were substantially:

1. That its road is a part of a continuous postal and military road constructed and maintained under the

authority of the United States, by means in part obtained from the general government; that the company having, with the the consent of the State become subject to the requirements, conditions and provisions of the Act of Congress, it thereby ceased to be merely a State corporation, and became one of the agencies or instrumentalities employed by the general government to execute its constitutional powers, and that the franchise to operate a postal and military road for the transportation of troops, munitions of war, public stores and other materials, and its right to exist and to operate being derived in part from the United States, cannot without their express consent be subject to State taxation.

2. That the provisions of the Constitution and laws of California in respect to the assessment for taxation of property of railway corporations, operating railroads in more than one county, are in violation of the fourteenth amendment to the Federal Constitution in so far as they require the assessment of such property at its full money value, without making deduction, as in case of railroads and other property belonging to corporations not quasi-public ~~operated wholly in one county, and of other corporations,~~ and of natural persons, for the value of the mortgages covering the property assessed, thus imposing upon the defendant unequal burdens and to that extent denying to it the equal protection of the law.

3. That the assessment upon which the action is based is void because it includes property which the State Board of Equalization had no jurisdiction under any circumstances to assess, and that as such illegal part was

so blended with the balance that it cannot be separated, the entire assessment must be treated as a nullity.

4. That the law of the State of California, under which the proceedings in this case were instituted in the Superior Court, as well as the law in force, which prescribes the mode and manner of collecting taxes assessed by the State Board of Equalization, are special laws and violate the provisions of subdivisions 3rd and 10th of Section 25 of Article 4 of the Constitution of the State of California.

The general laws of California provide for the assessment and collection of taxes, and also regulate the practice in Courts of Justice in that State. The general laws for the collection of taxes, in force in the State of California vary in every particular from the special law for the collection of taxes assessed by the State Board of Equalization. The Code of Civil Procedure of the State of California regulates the practice in Courts of Justice.

The Constitution of the State of California, Article IV, Section 25, provides:

SEC. 25. "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * *

"*Third.*—Regulating the practice of Courts of Justice. * * *

"*Tenth.*—For the assessment or collection of taxes." * * *

The laws claimed to be special regulating the collection of these taxes and providing for special practice in

Courts of Justice in relation to these cases, are found in Sections 3666, 3667, 3668, 3669, and 3670 of the Political Code of California as amended March 9th, 1883. The sections read as follows:

SEC. 3666. "The State Board of Equalization must prepare each year a book to be called 'Record of Assessment of Railways,' in which must be entered each assessment made by the Board, either in writing, or by both writing and printing. Each assessment so entered must be signed by the Chairman and Clerk. The record of the apportionment of the assessments made by the Board to the counties, and cities and counties, must be made in a separate book to be called 'Record of Apportionment of Railway Assessments.' In such last described book must be entered the names of the railways assessed by the Board, the names of the corporation to which or the name of the person or association to whom each railway was assessed, the whole number of miles of the railway in the State, the number of miles thereof in each county, or city and county, the total assessment of the franchise, roadway, road-bed, rails and rolling-stock for purposes of State taxation, the amount of the apportionment of such total assessment to each county, and city and county, for county and city and county taxation. Before the third Monday of October of each year the Clerk of the State Board of Equalization must prepare and transmit to the Controller of State duplicates of the 'Record of Assessment of Railways' and 'Record of Apportionment of Railway Assessments,' each certified by the chairman and clerk of the Board, and to be known respectively as 'Duplicate Record of Assessment of Railways,' and 'Duplicate Record of Apportionment of Railway Assessments.' In the last named duplicate two columns must be added, in one of which the Controller must enter the State taxes due the State, upon the whole assessment, by each corporation, person or association; and in the other the county or city and county taxes due upon the assessment apportioned to each county or city and county by each corporation, person or association. The two duplicates

constitute the warrant for the Controller to collect the State and county and city and county taxes levied upon such property assessed by the Board, and the amount of the apportionment of the assessment to each county, and city and county, respectively." (New section, approved March 9, 1883; Statutes and Amendments 1883, p. 65; went into effect immediately.)

SEC. 3667. "When the Board of Supervisors of each county, and city and county, to which the State Board of Equalization has apportioned the assessment of railways, shall have fixed the rate of county, or city and county taxation, the clerk of the Board of Supervisors must forthwith, by mail, postage paid, transmit to the Controller a statement of the rate of taxation levied by the Board of Supervisors for county, or city and county taxation. If the clerk fails to transmit such statement, the Controller must obtain the information as to such rate of taxation from other sources. On or before the fourth Monday of October, the Controller must compute and enter in separate money columns in the 'duplicate record of apportionments of railway assessments' the respective sums, in dollars and cents, rejecting fractions of a cent, to be paid by the corporation, person, or association liable therefor, as the State tax upon the total amount of the assessment, and the county, or city and county tax upon the apportionment of the assessment to each county, and city and county, of the property assessed to such corporation, person or association named in said duplicate record." (New section, approved March 9, 1883; Statutes and Amendments, 1883, p. 65; went into effect immediately.)

SEC. 3668. "Within ten days after the fourth Monday in October, the Controller must publish a notice for two weeks, in one daily newspaper of general circulation at the State Capital, and in two daily newspapers of general circulation published in the City of San Francisco, specifying:

"1. That he has received from the State Board of Equalization the 'duplicate record of assessments of railways,' and the 'duplicate record of apportionment of railway assessments';

"2. That the taxes are now payable, and will be delinquent on the last Monday in December next, at 6 o'clock P. M., and that unless paid to the State Treasurer at the Capitol prior thereto, five per cent will be added to the amount thereof. On the last Monday in December of each year, at 6 o'clock P. M., all of unpaid taxes are delinquent, and thereafter there must be collected by the State Treasurer, or other proper officer, an addition of five per centum, which sum, when collected, must be set aside by the Treasurer as a fund with which to pay the contingent expenses of actions against any delinquents, the said expenses to be audited by the Board of Examiners. When any taxes are paid to the State Treasurer by order of the Controller, upon assessments made and apportioned by the State Board of Equalization, the Controller must forthwith notify the Auditor and Treasurer, respectively, of each county, and city and county, that such taxes have been paid, and of the amount thereof to which each county, and city and county, interested, is entitled. The State's portion of the taxes must be distributed by the Treasurer to each fund entitled thereto, and the portion belonging to the counties, and cities and counties, must be placed in a fund to be called 'Railway Tax Fund,' to the credit of each county and city and county entitled thereto. When any taxes are placed in the 'Railway Tax Fund' to the credit of a county, or city and county, the Controller, at the next settlement with the Controller by the Treasurer of such county, or city and county, must draw and deliver to such Treasurer his warrant upon the State Treasurer for the amount in the fund to the credit of such county or city and county."

SEC. 3669. "Each corporation, person, or association assessed by the State Board of Equalization must pay to the State Treasurer, upon the order of the Controller, as other monies are required to be paid into the Treasury, the state and county, and city and county taxes, each year levied upon the property so assessed to it or him by said Board. Any corporation, person, or association dissatisfied with the assessment made by the Board upon the payment of the taxes due upon the assessment complained

of, and the five per cent added, if to be added, on or before the first Monday in February, and the filing of notice with the Controller of an intention to begin an action, may not later than the first Monday of February, bring an action against the State Treasurer, for the recovery of the amount of taxes and percentage so paid to the Treasurer, or any part thereof; and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint and of the summons must be served upon the Treasurer within ten days after the complaint has been filed, and the Treasurer has thirty days within which to demur or answer. At the time the Treasurer demurs or answers he may demand that the action be tried in the Superior Court of the County of Sacramento. The Attorney-General must defend the action. The provisions of the Code of Civil Procedure, relating to pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for. If the final judgment be against the Treasurer, upon presentation of a certified copy of such judgment to the Controller, he shall draw his warrant upon the State Treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected, and the cost of such action, audited by the Board of Examiners, must be paid out of any money in the general fund of the Treasury, which is hereby appropriated; and the Controller may demand and receive from the county, or city and county interested the proportion of such costs, or may deduct such proportion from any money then or to become due to said county, or city and county. Such action must be begun on or before the first Monday in February of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action."

SEC. 3670. "After the first Monday of February of each year, the Controller must begin an action in the proper court, in the name of the People of the State of California, to collect the delinquent taxes upon the property assessed by the State Board of Equalization. Such suit

must be for the taxes due the State, and all the counties and cities and counties, upon property assessed by the Board of Equalization, and appearing delinquent upon the 'duplicate record of the apportionment of railway assessments.' The demands for State and county, and city and county taxes may be united in one action. In such action a complaint in the following form is sufficient:

[Title of Court.]

"THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

[NAMING THE DEFENDANT].

"Plaintiff avers that on the —— day of ——— in the year [naming the year], the State Board of Equalization assessed the franchise, roadway, road-bed, rails, and rolling-stock of the defendant, at the sum of [naming it], dollars: That the Board apportioned the said assessment as follows: To the county of [naming it] the sum of [naming it] dollars, and so on [naming each county].

"That the defendant is indebted to plaintiff for State and county taxes for the year 18—, in the following sums: For State taxes, in the sum of [naming it] dollars; for county taxes of the county of [naming it], in the sum of [naming it] dollars, etc., with five per cent added for non-payment of taxes. Plaintiff demands payment for said several sums, and prays that an attachment may issue in form as prescribed in Section 540 of the Code of Civil Procedure.—[Signed by the Controller or his Attorney.]

"On the filing of such complaint the clerk must issue the writ of attachment prayed for, and such proceedings shall be had as under writs of attachment issued in civil actions. No bond nor affidavit previous to the issuing of the attachment is required. If in such action the plaintiff recover judgment, there shall be included in the judgment as counsel fees—and in case of judgment of taxes, after suit brought but before judgment, the defendant must pay as counsel fees—such sum as the Court may determine to be reasonable and just. Payment of the taxes or the amount of the judgment in the

case must be made to the State Treasurer. In such actions the duplicate record of assessments of railways and the duplicate record of apportionment of railway assessments, or a copy of them, certified by the Controller, showing unpaid taxes against any corporation, person, or association, for property assessed by the State Board of Equalization, is prima facie evidence of the assessment, the property assessed, the delinquency, the amount of the taxes due and unpaid to the state, and counties, or cities and counties therein named, and that the corporation, person or association is indebted to the people of the State of California in the amount of taxes, state and county and city and county therein appearing unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with."

The articles and sections of the Constitution of the State of California bearing upon the questions involved in this case are as follows:

CONSTITUTION.

Article XIII.

"Section 1. All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership: *Provided*, That growing crops, property used exclusively for public schools, and such as may belong to the United States, to this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a

deduction from credits of debts due to *bona fide* residents of this State."

"SEC. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. *Except as to railroads and other quasi public corporations*, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof in the county, city, or district in which the property affected thereby is situated. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof: *Provided*, That if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy of the preceding year."

"SEC. 8. The Legislature shall by law require each taxpayer in this State to make and deliver to the county asessor, annually, a statement, under oath, setting forth specifically all the real and personal property owned by such tax-payer, or in his possession, or under his control, at twelve o'clock meridian, on the first Monday of March."

"SEC. 9. A State Board of Equalization, consisting of one member from each Congressional district in this State, shall be elected by the qualified electors of their respective districts at the general election to be held in the year one thousand eight hundred and seventy-nine, whose term of office after those first elected shall be four years, whose duty it shall be to equalize the valuation of the taxable property in the several counties in the State

for the purposes of taxation. The Controller of State shall be *ex-officio* a member of the Board. The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation: *Provided*, Such State and county boards of equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe, as to the county assessments, and under such rules of notice as the State board may prescribe, as to the action of the State board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll."

"SEC. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts, in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

"SEC. 13. The Legislature shall pass all laws necessary to carry out the provisions of this article."

ARTICLE XII.

"SEC. 1. Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time, or repealed."

Section 3665 of the Political Code of California, as amended March 9, 1883, so far as the same is material to this case, is as follows:

"3665. The State Board of Equalization must meet at the State Capitol on the first Monday in August, and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the Board must assess the franchise, roadway, road-bed, rails and rolling-stock of all railroads operated in more than one county. Assessment must be made to the corporation, person or association of persons owning the same, and must be made upon the entire railway within the State, and must include the right of way, bridges, culverts, wharves and moles upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road. The depots, stations, shops and buildings erected upon the space covered by the right of way are assessed by the Assessor of the county wherein they are situate." * * *

POINT I.

The Central Pacific Railroad Company is one of the Means and Instrumentalities Selected and Employed by Congress to Carry into Operation the Powers granted to the General Government. A tax upon its Franchise, upon its Right to Exist, is, within the meaning of all the authorities, a tax upon the Means and Instrumentalities of the General Government. Without the Express Consent of Congress no State can Impose such a tax.

The Acts of Congress.

On the first of July, 1862, Congress, in the exercise of powers that are not now questioned, passed "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and

to secure to the Government the use of the same for postal, military, and other purposes." (12 U. S. Stat., 489.)

The first section of the Act names a number of persons, and declares that they, "together with five Commissioners, to be appointed by the Secretary of the Interior, and all persons who shall or may be associated with them and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the 'Union Pacific Railroad Company.'" The company thus created is vested with the usual and customary powers of a corporation. The corporation is then expressly authorized to construct and maintain a railroad and telegraph line upon a given line and between certain points named The amount of the capital stock is next prescribed, and also certain rules and regulations for the government of the corporation, the management of its affairs, and the transaction of its business. Provision is also made for the election of a Board of Directors, and for the appointment of two additional Directors by the President of the United States, to act as Directors on the part of the Government. The second section grants a right of way through the public lands, with the further right to take from the public lands, adjacent to the line of the road, materials of every description for the construction of the road, concluding with a promise on the part of the United States that the Indian titles to all lands falling under the operation of the Act shall be extinguished as rapidly as may be. The third section grants to the Company alternate sections of land, on each side of said

road, with certain reservations as to mineral lands and lands reserved, or otherwise disposed of, or to which pre-emption or homestead claims have attached. The fourth section provides, among other things, for the appointment of three Commissioners by the President, who are to examine the road from time to time, and report to him as to the manner of its construction and the progress made therein, with a view to the issuing of patents for said lands, and that all vacancies occurring in said Board of Commissioners shall be filled by the President. The fifth section provides for the loaning of the credit of the Government, in the shape of bonds, and securing the payment thereof by a first lien upon the road and telegraph, together with all the rolling stock and other property, and concludes with a provision which has a most important bearing upon the question in hand, viz.:

"And on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this Act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said Company by the United States, which at the time of said default, shall remain in the ownership of the said Company, *may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States.*"

This provision is followed by another contained in the sixth section, which provides:

"That the grants aforesaid are made upon condition that said Company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said

telegraph line, and transport mails, troops, and munitions of war, supplies and public stores upon said railroad for the Government whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid."

Power to consolidate with other companies named in the Act is given in the sixteenth section. The right to connect with the road is given to other companies by the fifteenth section. The President is authorized to establish a uniform width of track, so that the same cars can be run from the Missouri River to the Pacific Ocean, by the twelfth section. The seventeenth section provides that if said Company shall fail to comply with the terms and conditions of the Act, or to keep the road in repair and use for an unreasonable time, "Congress may pass any Act to insure the speedy completion of said roads and branches, or put the same in repair and use and *may direct the income* of said railroad and telegraph line to be thereafter devoted *to the use of the United States," etc.;* and further, that if said roads are not completed "*so as to form a continuous line from the Missouri River to the navigable waters of the Sacramento River* by the first day of July, 1876, said road with all their rolling-stock, fixtures, etc., *shall be forfeited to and be taken possession of by the United States.*" The eighteenth section provides that when the net earnings of the road and telegraph shall have reached a certain per centum upon their cost.

"Congress may *reduce the rates of fare thereon,* if reasonable in amount, and *may fix and establish the same by*

law, * * * and may at any time, *having due regard for the rights of said companies* named herein, *add to, alter, amend, or repeal* this Act."

Finally, by the last section, the company is required to make annual reports, as to certain matters therein mentioned, to the Secretary of the Treasury, for the obvious purpose of enabling the General Government to supervise and control the road and telegraph by legislation and otherwise. (12 U. S. Statutes at large, 489.)

The Union Pacific Railroad Company, a National Corporation.

It is clear that the Union Pacific Railroad Company is a national corporation, created for the benefit and use of the General Government, in the conduct and management of its postal, military, and other affairs, and it has been so decided. (*U. P. R. R. Co.* vs. *Meyers*, 115 U. S.) The Central Pacific Railroad Company bears substantially the same relation to the National Government. The relation of the Central Pacific to the General Government differs from that of the Union Pacific in one respect only. The Central Pacific was not in the first instance a corporation created by the General Government. It was a corporation under the laws of the State of California prior to the passage of the Pacific Railroad Act; its powers were confined to that State.

By the Act of 1862 Congress conferred upon the Central Pacific the same powers which it conferred upon the Union Pacific, annexing thereto the same conditions. In the ninth section of the Act it is provided that:

"The Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California are hereby authorized to construct a railroad and telegraph line from the Pacific Coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this Act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California."

Again, in the tenth section, it is further provided:

"And the Central Pacific Railroad Company of California, after completing its road across the State, is authorized to continue the construction of said railroad and telegraph through the territories of the United States to the Missouri River, including the branch roads specified in this Act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this Act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole of said railroad and branches and telegraph is completed."

In Section 16 of the Act of Congress of July 2, 1864, it was provided that upon complying with certain conditions (all of which have been complied with) the Central Pacific Railroad Company "shall enjoy all the rights, privileges and benefits conferred by this Act upon the Union Pacific Railroad Company."

Pacific Railroad Acts Compared with the Act Establishing the Bank of the United States.

In respect to this question of taxation, and in respect to the Union Pacific Railroad Company, the Act of Congress in question is upon all fours with the Act by which the Bank of the United States was established (3 U. S. St. at Large, 266). The plan adopted by Congress for the purpose of establishing the bank and securing its use to the Government, as a financial agent, is so similar to that adopted in the present case, as to suggest that the former served as a model for the latter. As in this instance, a corporation with full banking powers, was created. The amount of its capital stock was fixed at thirty-five millions of dollars, of which sum the Government was to subscribe only one-fifth, or seven millions, leaving twenty-eight millions to be taken by private individuals. The affairs of the bank were to be managed by twenty-five Directors, of whom twenty were to be elected by the stockholders and five to be appointed by the President of the United States, by and with the advice and consent of the Senate. The powers of the Directors and the business operations of the institution were defined and restricted. Power was given, with certain restrictions, to establish branch institutions in the several States. The Secretary of the Treasury was authorized to call upon the bank for a statement of its affairs as often as once a week. For the privileges and benefits conferred by the charter, the President and Directors of the bank were required to pay to the United

States a bonus of one million and five hundred thousand dollars, in three equal payments. And it was lastly provided that the books of the corporation should always be open to the inspection of a committee of either House of Congress appointed for that purpose.

Contrast these provisions with those of the Railroad Act, to which reference has been made, and it will appear that the interest of the Government in the bank was much less, and the powers over its management and affairs assumed by the Government was much less sovereign than in the case of the railroad. The interest of the Government in the bank was but five millions of dollars ; to the Pacific Railroad and telegraph it has loaned sixty-three millions in bonds, and has made extensive grants of lands. As the Government shared in the management of the bank, through directors appointed by the President, so does it share in the management of the Union Pacific through the same means. As the Government was authorized to watch the operations of the bank, through committees of Congress, and reports by the directors of the bank to the Secretary of the Treasury, so has it watched the construction of the railroad and telegraph, through Commissioners appointed by the President, and so has it, and does it, inspect the management and affairs of the Pacific Railroad and telegraph, through annual reports made by the directors for a time to the Secretary of the Treasury, but latterly to the Secretary of the Interior. As the Government reserved the power to control the loans and business operations of the

bank by legislation, so has it reserved the right to fix and establish by law *fares and freights* upon the Pacific Railroad. The authority asserted over the bank was, therefore, in no respect greater than that asserted over the railroad; on the contrary, the authority asserted over the railroad is far greater, in a most important particular. Nowhere in the Act by which the bank was established was any provision made for the forfeiture of its franchises, or for taking possession of its property by the Government and administering its affairs through other agencies, or the devotion of its income and resources to the use of the United States. Yet the power to do all of these acts which lie at the extreme verge of governmental power, has been reserved by the Government in the case of the Pacific Railroad and telegraph.

Reference to the History of the Times.

"In construing an Act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The Act itself speaks the will of Congress, and this is to be ascertained from the language used. But Courts in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it."

(*U. S.* vs. *The Union Pacific Railroad Company*, 91 U. S. 79.)

The Act of Congress under which the first transcontinental road was constructed, declares that it was passed to secure to the government the use of the

road for postal, military and other purposes. The history of the times when it was passed cannot be recalled without impressing upon our minds the fact that the road in question was to be for National purposes of the highest kind. The population of the United States at that time was a little more than thirty-one millions and was confined chiefly to the states lying east of the Mississippi River. The great States of Minnesota, Iowa, Missouri and Arkansas lying west of the Mississippi River, then having populations small in comparison with the present population of either, and the settlements in these States were, by the very necessities of the situation, confined to territory lying within a few miles of navigable streams. West of the Missouri River, south of British Columbia, north of the Rio Grande and east of the Sierra Nevada Range, was a territory almost, if not quite, equal in extent to that east of the Mississippi River. It was fourteen hundred miles in width and thirteen hundred miles in length; greater in extent, and richer in natural resources than all the territory which Cæsar's legions gave to the Dominion of Rome. Excepting the Mormon colony at Salt Lake, it was without a white settlement of any size, from the Missouri to the Sierras. It was a solitude, the silence of which was unbroken save by the trapper, the wild animals and the wilder savage tribes, its only occupants. Much of it as late 1850, was marked upon the maps as the "American Sahara, or the Great unexplored Desert." In the length and breadth of this territory there were but few navigable streams and its occupation by civilized man as it then stood was an impossibility.

The conditions, even near the banks of the Missouri River, is graphically described by the Chief Engineer of the Union Pacific, in his report to the President of that company, dated December 1, 1869. He says:

"In 1863 and in 1864 surveys were inaugurated, but in 1866, the country was systematically occupied, and day and night, summer and winter the explorations were pushed forward through dangers and hardships that very few at this date appreciate, as every mile had to be run within range of the musket. There was not a moment's security. In making the surveys numbers of our men, some of the ablest and most promising were killed, and during the construction our stock was run off by hundreds, I might add by the thousands."

The situation in the same respect was not less dangerous between the Sierras and Ogden, the country was infested with Indian tribes hostile to and nearly constantly at war with the whites.

West of the Sierras and bordering upon the Pacific lay the States of California and Oregon exposed to attack in case of a foreign war. The people of California had from the very beginning demanded at the hands of the Federal Government the construction of a trans-continental road; resolution after resolution had been passed by the Legislature of California, and at last, to such length did it go that a convention was called to insist upon some action upon the part of the National Government. Muttered threats were heard that if the Government failed to perform what California believed to be an obligation, that a Pacific Republic would be the consequence. The National Conventions of both the

Democratic and Republican parties declared that the construction of a road across the continent by which the States should be bound together by bonds of steel was a military necessity and that such road should be built at once. But nothing practical was done by Congress until the country was involved in a civil war. Then California became a doubtful State and for a long time it was questionable whether her destinies would be cast with the North or with the South. The importance of this State to the Union could not be overestimated. She possessed one of the finest ports upon the Pacific Coast. In the hands of the Confederate Government would have been invaluable. Her shipments of gold diverted to the Confederate Treasury would have drained that of the Union and enriched that of the Confederacy. As a military necessity, and to secure to the Government the use of a railroad and telegraph line from the Missouri River to the Pacific Ocean for postal, military and other purposes, Congress on the first day of July, 1862, passed the Act chartering the Union Pacific and making offers of aid to the Central Pacific of California, then in existence and operation as a corporation. The aids granted by this Act have been referred to. Under this Act the Central Pacific began the prosecution of its work, but the Union Pacific was unable to do anything. On the 2d of July, 1864, Congress passed the second Act amending in many respects the Act of 1862, increasing the land subsidy and subordinating the Government lien to the mortgages which it authorized the

various roads to issue. Some of the reasons for the passage of this Amendatory Act of July 2d, 1864, are given by the Supreme Court of the United States in the case of the *United States* vs. *The Union Pacific Railroad Company*, 91 U. S. 80, and these reasons are so pertinent to the argument in hand that I cannot refrain from quoting:

"Many of the provisions in the original Act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed. The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but, even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provisions for the future. This could be done in no better way than by the construction of a railroad across the Continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the Government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it departed from the then settled policy, of the country regarding works of internal improvement, and charged the Government itself with the direct execution of the enterprise.

"This enterprise was viewed as a national undertaking for national purposes; and the public mind was directed to the end in view, rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposedfrontier. There was a vast unpeopled territory lying between the Missouri and Sacramento rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed. settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails and of supplies for the army and the Indians.

"It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable."

There were graver and more potent reasons which caused the Congress of the United States to promote the immediate construction of a trans-continental road. While the Act of 1864 was under discussion, Johnston with a powerful army confronted Sherman; Lee held Grant in check at Petersburg; Early was advancing upon the National Capital. He took Harper's Ferry two days after the approval of the Act and before its approval was announced in the body in which it had originated Early's troops were in sight of the National Capital. The unhappy Austrian was upon the throne of Mexico. Bazaine with French troops occupied the country; Napoleon III was seeking an alliance with England in

order to interfere on behalf of the Confederacy. Complications of a serious character existed with England, and that alliance was likely to be consummated. It would have been followed to a certainty by a blockade of the Pacific Coast if not by a capture and occupation of Oregon and California. Nearly the whole power of the national Government was exhausted; its finances were crippled, and so clouded was its political horizon that one of the political parties on the 19th of August, 1864, in its platform declared that the war was a failure and that peace should be made at almost any sacrifice.

It was in view of all these reasons that Congress passed the Act of 1864 which set in motion the Union Pacific Railroad and which in the end secured to this people and to the Government a trans-continental line. It is in the light of these historical facts, that the Court will consider the question now presented.

The Exemption Claimed.

It has been claimed on behalf of the Central Pacific Railroad Company—and with great plausibility—that by reason of these Acts the General Governmet has converted it into a National corporation, and that in form as well as substance, it bears the same relation to the Federal Government and to the States, as does the Union Pacific Company. It is also claimed that the State of California has assented to the adoption. That Congress had intended to and supposed it had erected the Central Pacific Railroad Company into a National corporation is evident. Section

17 of the Act of 1862 provides in direct terms for a forfeiture to the United States, for a non-performance of conditions, of the property and franchises of that corporation "conditions can only be reserved to the feoffer, donor or lessor and their heirs; but not to a stranger." It would not be competent for Congress to provide for the forfeiture of the franchises of a State corporation to the National Government for non-performance of conditions, or to provide for the entry of the United States for such conditions broken, for "he who enters for conditions broken shall be in of the same estate he was before."

Wiseman vs. *McNulty*, 25 Cal., 239.

But whether it be true or not that the Central Pacific Railroad Company has in form been made a Federal corporation, I shall not, at this point, stop to inquire. The question whether it is or is not a Federal corporation is of minor importance. Corporation or no corporation is not a factor in the solution of the problem.

The Central Pacific Railroad Company is an Instrument of the General Government.

By the unquestioned Act of Congress the Central Pacific Railroad Company was selected as a means and instrument of the General Government to carry into execution the admitted powers of that Government. It was authorized to construct and operate a railroad and telegraph line upon the same "terms and conditions in all respects" as the Union Pacific.

These "terms and conditions" constitute the tests whether or not it has been made an instrument of the General Government. Congress has declared the reason and purpose in the title of the Act to be to "secure to the Government the use" of a railroad from the Missouri River to the Pacific Ocean, "for postal, military and other purposes." To effectuate that purpose Congress created a corporation known as the Union Pacific Railroad Company, and adopted the Central Pacific Railroad Company, and to these corporations, upon the same terms and conditions, intrusted the execution of its purposes. The two companies were charged by Congress with the speedy construction of the road and telegraph line. It was made their duty, when completed, to keep the same in repair and use, so that upon demand of the Government they could transmit its dispatches over the telegraph line and transport its mails, troops munitions of war, supplies and public stores upon the railroad. To the end that these companies might be in condition to perform these great governmental functions, aids in lands were given, and bonds were loaned. That the Pacific Railroad Cos. might maintain and operate the the vast machine intrusted to their care, and be ready at all times to give to the Government its aid in peace and in war, without too great a charge upon the public treasury, they were authorized to transact business for private parties, but were required at all times to subordinate such business to the public duties cast upon them. The Government "must at all times have the preference." At all times both companies are subject to the

orders of the General Government, and must, at its command, devote themselves to the performance of their governmental functions to the absolute exclusion of all other business. Not more absolute is the control of the General Government over the officers who command its steam frigates than is its control over the agents who constructed and who manage the trans-continental roads. The Government may, for the purposes of his creation, control every public and official action of a captain in the navy. All this may it do with these corporations, and it has assumed to do more—to control their relations with private parties and regulate the terms and conditions upon which they shall transact their private affairs. Congress has employed these corporations as a means to carry its powers into execution. Can the State Governments destroy either? This is one of the questions upon the solution of which depends the validity or invalidity of the State tax sought to be imposed upon the franchise, or the right of the Central Pacific Railroad Company to exist and operate its lines.

The Power to Create implies the Power to Preserve.

The power to create implies the power to preserve. The power to destroy, if wielded by a different hand, is hostile to and incompatible with the power to create and preserve. Where that repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme. "These propositions as abstract truths," says Chief Justice Marshall (4 Wheat., 426), "would, perhaps, never be controverted."

Are these propositions applicable to the case in hand? Let us consider them separately, and in the order of inquiry the first will be:

Power of Congress to Select Its Means or Instrumentalities.

At this late date no argument would seem to be necessary to maintain the proposition that Congress possessed the power to select the Central Pacific Railroad Company and create it an agent of the General Government —to make it one of the means or instruments for the construction of a transcontinental railway and telegraph, and one of the means and instrumentalities by which the use of the same for postal, military and other purposes could be secured to the Government. The Federal Constitution expressly confers upon Congress the power among others to provide for the common defense and general welfare of the United States; to establish post-roads; to declare and carry on war, and to make all laws which shall be necessary and proper for carrying into execution the powers granted. With respect to the means by which the powers it confers are to be executed, the Constitution has been construed to allow to Congress that discretion which will enable it to perform the high duties assigned in the manner most beneficial. After Congress has acted it is not for the Courts to determine whether the means selected are the best possible. Such considerations are for Congress alone. If the end be legitimate, if it be within the scope of the Constitution, then all means which are plainly adapted to that end, whether better ones could be found or not, may be constitutionally used by Congress.

McCulloch vs. *Maryland*, 4 Wheaton, 421.

We have seen that the declared purpose of Congress in providing for the construction of the trans-continental railway and telegraph was to "promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes." Was the end a legitimate one? Was it within the scope of the Constitution? In the progress of science, railways have become mighty engines in the prosecution of military enterprises. Indeed, their use may be said to have almost revolutionized the art of war. Not only are they proper means if the end be war, but they are admittedly necessary means without which no civilized nation would attempt to carry on warfare. This being so, then Congress would have the right to construct and to maintain them to subserve the public welfare. The power to construct and maintain necessarily includes the power to determine the mode and means of construction and maintenance and to select the instruments to keep the same in working order. In making this determination Congress created a corporation to construct and maintain the eastern section, and adopted a corporation already in existence to construct and maintain the western section. As to both sections the object of Congress was the same. To authorize some person to construct the road and to impose upon the person authorized the duty of keeping it in repair and use, so that, whenever required, the "mails,

troops and munitions of war" of the Government could be transported over it, and, if necessary, to the exclusion of all other traffic. This was the great purpose and object of the Government, and in this purpose and object Congress found the constitutional authority to act in the premises. The end was not to create one corporation or to adopt another, but was to create agents, or instrumentalities and means through which certain governmental functions could be exercised. It created one *corporation* and made it such an instrument or agent. It found another corporation in existence, and made it the means by which the power should, in part, be executed. Congress seized upon a State corporation and made it the instrument to execute its will. Congress by law gave it the right of way over the public lands; the right to contract debts and secure them by mortgage; the right to take and hold property; the right to build railroads in the Territories of the United States; the right to make contracts; the right to maintain ferries over navigable waters; the right to consolidate with other corporations, to adopt and use thereafter a corporate name, and to enjoy all the rights, privileges and benefits conferred upon the Union Pacific. Congress, by law, made it the duty of the Central Pacific Railroad Company to keep the road and telegraph in repair and use; and to transmit on demand, dispatches, mails, troops and munitions of war for the Government. It reserved the right to regulate freights and fares—to enter for condition broken, and to alter, amend and repeal. These rights, privileges, powers and duties, conferred and imposed, make the instrument

bear a wonderful resemblance to a Federal corporation. In these times Courts deal more with substance and less with form in construing laws, and when we remember that no particular form of words or mode of expression is necessary to the creation of a corporation, it is difficult to conceive that Congress intended less than the creation of a National corporation. But it is not the name which the instrument bears, but the faculties with which it is endowed and the purposes for which it is used, which give it immunity. All the rights and privileges above enumerated, all the rights and privileges which the Union Pacific enjoy, are conferred upon the Central Pacific by the Federal Government. That the Central Pacific Railroad Company is an agent of the Government precisely as the Union Pacific Company is, to the same extent, and for the same purposes, is not an open question. Such is the judgment of the Supreme Court of the United States.

(*Railroad Company* vs. *Peniston*, 18 Wallace 32.)

The State Cannot Destroy the Agent Selected.

No one has ever seriously questioned the power of Congress to enact the laws in question, and we may safely assume that Congress, "to promote the public interest and welfare * * * to secure to the Government at all times the use and benefit of the trans-continental road and telegraph" had the right to select the Central Pacific Railroad Company as an instrument—clothe it with the privileges and immunities given by law, and place it in charge of the western section of that road

and telegraph line. Can the State destroy this agent? No one would have the temerity to contend that a State could repeal the laws which give to the Central Pacific its character as a national agent. Whatever Congress has the power to do the individual States have no right to undo. Its power to select an agent and place it in charge of the machinery of war, like its other leading governmental powers, is supreme. As Mr. Pinckney aptly remarks (4 Wheat., 391): "A power to build up what another may pull down at pleasure is a power which can provoke a smile, but which can do nothing else." If the State cannot repeal the Acts of Congress under which this corporation now exercises all its functions, it cannot indirectly accomplish the same purpose. This agent chosen by the Federal Government must continue to exist, enjoy its privileges and immunities, and perform its obligations so long as that government wills. A constitutional law enacted by Congress, to carry into execution the power vested in the General Government confers privileges and immunities, and imposes obligations, which no State can in any manner retard, impede, burden or control. (*McCulloch* vs. *Maryland*, 4 Wheat., 316; *Osborn* vs. *Bank of United States*, 9 Wheat., 738; *Weston* vs. *City of Charleston*, 2 Peters, 466.) This, says Chief Justice Marshall (4 Wheat., 436), is "the unavoidable consequence of that supremacy which the Constitution has declared." And again (p. 425): "A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used."

The Power to Tax is the Power to Destroy.

The power of the State to tax the franchise of the Central Pacific Railroad Company, its right to exist and operate, is incompatible with the power of the Federal Government to adopt and use it as a governmental agent or instrument.

Early Adjudications Defining the Relations which the means or Instrumentalities of the General Government bear to the States.

In expounding the relations which the means, instruments and agencies of the General Government bear to the States, "a splendor of eloquence and strength of argument seldom, if ever, surpassed," has been supplemented by judgments pronounced by the most illustrious of the line of great judges who have adorned the American bench. In the investigation before us there are no strange waters to be traversed or new lands to be explored. The courses have been laid, the paths marked, and if we but follow them, no mistake can be made.

In *McCulloch* vs. *Maryland*, (4 Wheaton, 400), the defendant in error, the State of Maryland, denied the obligation of the law enacted by the Legislature of the Union creating the Bank of the United States, and the plaintiff in error on his part contested the validity of an act which had been passed by the Legislature of Maryland, taxing the operations of the Bank. The first question made in the cause was: Has Congress power to incorporate a bank? This question the Court answered

in the affirmative. In discussing the question, the nature of the General Government was inquired into, the conflicting powers of it and the State governments were brought into view, and the supremacy of their respective laws, when they are in operation, settled, and it was substantially held:

1. That the General Government emanates from and its powers were granted by the people; that though its powers are limited, it is supreme within its sphere of action, and its laws, when made in the pursuance of the Constitution, form the supreme law of the land.

2. That there is nothing in the Constitution of the United States which excludes the use of incidental or implied powers. That if the end be legitimate and within the scope of the Constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may be employed to carry it into effect.

3. That the power to establish a corporation is not a distinct governmental power, but only the means of carrying into effect other powers.

4. That Congress in carrying into effect any of the powers expressly given by the Constitution is the sole judge of the mode and manner and means by which such power may be executed, and of the propriety and necessity thereof. The question is one of legislative construction, and not of judicial cognizance.

The power to create a corporation as a substantive independent power does not exist in the General Govern-

ment; but the Government having the right to do an act, and having the duty imposed upon it of performing that act, must "according to the dictates of reason, be allowed to select the means." In the exercise of the right of selection, it may seize upon any means already in existence, and reasonably adapted to the purpose; and if no such means are in existence, or the means already in existence are not in the judgment of Congress the best to the end, it may bring into existence that artificial being commonly known as a corporation, and make it an instrument through which the powers of Government are to be exercised. It was not the fact that the General Government created a banking corporation which constituted that corporation a governmental agency. The creation of the corporation was a mere incident—the exercise of a power incident to the right of selection. It was the fact that Congress by law had endowed it with certain faculties relative to the fiscal operations of the Government, which threw around it the protection of one Government and shielded it from hostile legislation by the other. Nor is this mere matter of deduction or inference from the opinions of the Court. Chief Justice Marshall declares this to be so. "We do not," said the Chief Justice, "maintain that the corporate character of the bank exempts its operations from the action of State authorities. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties." *Osborn* vs. *U. S. Bank*, 9 Wheat., 362–3.

The second question made in *McCulloch* vs. *Maryland* (4 Wheat., 425), was whether the State of Maryland might, without violating the Constitution, tax the branch of the United States Bank established in that State?

Counsel for the bank placed its claim to be exempted from the power of a State to tax its operations upon the paramount character of the Federal Constitution. On the part of the State it was contended, not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it. and that the Federal Constitution leaves them this right, in the confidence that they will not be abused. In examining these positions and subjecting them to the test of the Constitution, the Chief Justice, speaking for the Court, says:

"We must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the States. It is admitted that the power of taxing the people and their property is essential to the very existence of the Government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the Legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the MEANS employed by the Government of the Union have

no security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the Legislature, which claims the right to tax them, but by the people of all the States. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all." (Pp. 428, 429.)

Again, the Court say: "There is no express provision for the case, but the claim" (the claim of counsel of bank to be exempted from the power of the State to tax its operations) "has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rendering it into shreds.

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States, and cannot be controlled by them." (P. 426.) Again: "That the power of taxing it" (the bank) "by States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power which acknowledges no other limits than those expressly prescribed in the Constitution, and, like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself is subordinate to, and may be controlled by the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction no principle not declared can be admissible which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action in its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. (Id., p. 427.)

To give effect to this supremacy the Court construes the Federal Constitution as placing, beyond the reach of the State, all the powers which are conferred by the people of the United States on the Government of the Union, and all of the means which are selected for the purpose of carrying those powers into execution. It maintains that by so doing, relief is had from clashing sovereignty and from interfering powers, "from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up—from the incompatability of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it" (the taxing power) "on the means employed by the Government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give."

We find, then, on a just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise." (P. 430.)

Still pursuing the subject, the Court asserts: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the consti-

tutional measures of another, which other, with respect to those very measures is declared to be supreme over that which exerts the control, are propositions not to be denied. * * * The Legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. * * * The question is, in truth, a question of supremacy; and if the right of the State to tax the means employed by the General Government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is an empty and unmeaning declamation."

The Judges were unanimous in the conclusion "that the States have no power, by taxation or otherwise *to retard, impede, burden,* or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government." (P. 436.)

In *McCulloch* vs. *Maryland* the tax involved was a stamp tax sought to be imposed by the State of Maryland upon the paper upon which the notes of the bank were printed. The tax was held unconstitutional, upon the ground that it was "a tax on the operation of an instrument *employed* by the Government of the Union to carry its powers into execution." (P. 437.) It was not unconstitutional because it imposed a tax upon the operations of a Federal corporation, but because it imposed a tax upon "an instrument employed by the Government." The test of immunity was not the corporate character,

but the purpose for which it was used by the General Government.

The next case in order of time is that of *Osborn* vs. *U. S. Bank* (9 Wheaton, 738). The State tax, the validity of which was attempted to be maintained in *Osborn* vs. *U. S. Bank*, was a tax laid by the Legislature of Ohio upon the right of the branch banks to do business in that State. It seems to have been conceded by counsel for the plaintiff in error, the party maintaining the validity of the tax, that the Government had the right to preserve the bank as its agent or instrument; but a distinction was sought to be made between the tax in question—a tax upon the business of the bank—and a tax levied upon the corporate franchise or right of the agent to exist. The Court held that no such distinction existed. "That to tax its faculties, its trade and occupation is to tax the bank itself; to destroy or preserve the one is to destroy or preserve the other." (P. 862.)

At this point in the argument we desire to bring into prominence the fact that in *Osborn* vs *U. S. Bank* it was held that there was no distinction between a tax upon the right of the instrument to exist, and a tax upon the operations of the instrument, and that this being so, all that was said in *McCulloch* vs. *Maryland*, relative to the power of a State to tax the operations of a governmental agent, applies with equal force when right to tax the existence of the agent is in question.

In their order, the next case is that of *Weston* vs. *The City of Charleston*, 2 Peters, 449. This case arose out of an attempt on the part of the City of Charleston to levy

a tax of 25 cents upon every $100 of the 6 and 7 per cent stock of the United States, owned and possessed within the limits of that city. The Court, Chief Justice Marshall rendering the decision, held the case to be within the principle settled in *McCulloch* vs. *The State of Maryland*, and reaffirmed the opinion in that case. In the argument it was not denied that the States could not tax any of the instruments or means used by the General Government in the execution of its powers (p. 479). But it was contended that only such taxes as were directly laid upon the means or instrument fell within the inhibition of the Federal Constitution. In answer to this argument, the Court said that any law directly obstructing the operation of a Constitutional Act of Congress, or hindering, impeding or burdening its operation was admittedly void, and that no distinction could be taken between direct opposition and those measures which may consequently affect the means.

After many years had elapsed, and when the great lawyers and judges who had participated in the discussions and decisions before referred to were resting in honored graves, another generation of judges and lawyers came to the consideration of the grave question involved. The Legislature of the State of Pennsylvania passed a law which authorized the assessment of a State and county tax upon "all offices and posts of profit." One Daniel Dobbins, a citizen and resident of the State of Pennsylvania, a captain in the Revenue Cutter Service of the United States, commanding the revenue cutter

"Erie," on the Erie Station, was assessed under this Act upon the office which he held. He resisted the payment of the tax. Suit was brought in the State Courts to enforce it, and judgment was finally rendered by the Supreme Court of Pennsylvania, sustaining the tax. Capt. Dobbins brought the case to the Supreme Court of the United States by a writ of error. (*Dobbins* vs. *The Commissioners of Erie County*, 16 Peters, 435.) In the Supreme Court of the United States, counsel for the defendant in error admitted that a State tax upon the hull and apparel of the revenue cutter commanded by Capt. Dobbins would have been unconstitutional, for the reason that the cutter "was the 'means' or 'instrument'" of the Government. (Counsel might also have placed his admission upon another ground, *i. e.*, that the cutter was the property of the United States.) But he maintained that the tax by the State was not of such instrument, but of *one of her citizens*, whose income was rated to fix the amount of his contribution to the public burden. The Court, after clearing the case of objections which did not relate to the constitutionality of the tax, proceeded to discuss the question, "whether the plaintiff is liable to be rated and assessed for his office under the United States, for county rates and levies?"

Say the Court (p. 447):

"Taxation is a sacred right, essential to the existence of government; an incident of sovereignty. The right of legislation is co-extensive with the incident, to attach it upon all persons and property within the jurisdiction of a State. But in our system there are limitations

upon that right. There is a concurrent right of legislation in the State, and the United States, except as both are restrained by the Constitution of the United States. Both are restrained upon this subject by express prohibitions in the Constitution. And the States by such as are necessarily implied when the exercise of a right by the State conflicts with the perfect execution of another sovereign power delegated to the United States. That occurs when taxation by a State acts upon the instruments, emoluments and persons, which the United States may use and employ as necessary and proper means to execute their sovereign power * * * * Congress has power to lay and collect taxes, duties, imposts, etc., and to regulate commerce with foreign nations and among the several states, and with the Indian tribes. Neither can be done without legislation."

The Court held, that to do either, a complicated machinery of forms, instruments, and persons must be established, and that laws to these ends constitute legislation by Congress in execution of sovereign powers. "They are the means necessary to the allowed end: the end, the great objects which the Constitution was intended to secure to the States in their character as a nation." (P. 448.)

In applying the principles stated to the case in judgment, the Court say:

"Is the officer, as such, less a means to carry into effect these great objects than the vessel which he commands, the instruments which are used to navigate her, or the guns put on board to enforce obedience to the law. These inanimate objects, it is admitted, cannot be taxed by a State, because they are means. Is not the officer more so, who gives use and efficacy to the whole?" (P. 448.)

"The unconstitutionality" (of the tax in question) "may be safely put—though is not the only ground—upon its interference with the constitutional means which have been legislated by the Government of the United States, to carry into effect its powers to lay and collect taxes, duties, imposts, etc., and to regulate commerce. In our view, it presents a case of as strong interference as was presented by the tax imposed by Maryland, in the case of McCulloch, 4 Wheaton, 316, and the tax of the City Council of Charleston, in Weston's case, 2 Peters, 449, in both of which it was decided by this Court that a State cannot lay a tax upon the constitutional means employed by the Government of the Union to execute its constitutional powers." (449.)

The other ground upon which the Supreme Court of the United States held that the immunity might be tested, was the exemption of the salaries of all officers of the United States from taxation by the States; but the main ground upon which it held it might safely be placed, was that of interference by the States with the means employed by the Government of the Union to execute its powers. Bearing this proposition steadily in view, let us now consider whether, if Congress, instead of constructing the revenue cutter "Erie" in a navy-yard of the United States, had seen proper by law to authorize Capt. Dobbins to construct it, and had loaned him the money of the Government to aid in such construction, and had taken a mortgage upon the vessel to secure that loan, and had authorized Capt. Dobbins to use the vessel in part in private business, reserving the right to control that business to a certain extent, but requiring him at all times to hold himself and the vessel to which he held the legal title, in readiness to execute

the orders of the Government relating to the revenue service on Lake Erie, and let us further suppose that Congress, instead of fixing his compensation had allowed him to receive it from the private business in which he was engaged. In this event would the relation of Captain Dobbins, or of his ship, toward the National Government have been changed? The relation of the ship in one respect would have changed, for the Government, instead of holding the legal title to it, would only hold a mortgage upon it.

Whether it still bore to the Government such a relation of means to an end as to exempt it from State taxation is a grave and serious question, upon which it will be seen during the course of this argument the Supreme Court of the United States has been almost evenly divided, but granting, for the purposes of the argument, that in both respects the relation of the vessel to the United States would be changed, yet it is clear that the relation of Capt. Dobbins would remain the same. To prove that this is so, we refer again to *Osborn* vs. *U. S. Bank,* 9 Wheaton, 863, where it is said:

"We do not maintain that the corporate character of the bank exempts its operations from the action of State authority. If an individual were to be endowed with the same faculties, for the same purpose, he would be equally protected in the exercise of those faculties."

"The operations of the bank are believed not only to yield the compensation for its services to the Government, but to be essential to the performance of these services. * * * The business of the bank constitutes its capacity to perform its functions as a machine

for the money transactions of the Government. Its corporate character is merely an incident which enables it to transact that business more beneficially."

"Were the Secretary of the Treasury to be authorized by law to appoint agencies throughout the Union to perform the public functions of the bank, and to be endowed with its faculties as a necessary auxiliary to those functions, the operation of those agents would be as exempt from the control of the States as the bank, and not more so. If, instead of the Secretary of the Treasury, a distinct office were to be created for the purpose, filled by a person who should receive as a compensation for his time, labor and expense the profits of the banking business instead of other emoluments, to be drawn from the treasury, which banking business was essential to the operation of the Government, would each State in the Union possess a right to control these operations?"

"The question on which this right would depend must always be: Are these faculties so essential to the fiscal operation of the Government as to authorize Congress to confer them? Let this be admitted, and the question: Does the right to preserve them exist?—must always be answered in the affirmative." (863, 864.)

It having been authoritatively determined in *Osborn* vs. *The U. S. Bank* that so far as immunity was concerned there was no distinction between a tax upon the means or agent and a tax upon the operations of the means and the agent—that one was the equivalent of the other—therefore, upon the authority of that case, and upon the case of *Dobbins* vs. *The Commissioners*, it may be safely asserted that the relation of Capt. Dobbins to the United States would remain unchanged, although the vessel which he commanded was his own private property, and not within the immunity.

Then, how stands the case of the Central Pacific Railroad Company, assuming it to be, strictly speaking, a

State Corporation only? It is a citizen and resident of the State of California, as Capt. Dobbins was a citizen and resident of the State of Pennsylvania. The Congress of the United States has seized upon it as a means to execute the war power of the National Government, as Congress selected Capt. Dobbins as a means to execute the revenue powers. Congress has placed it in charge of a national work, originating in national necessities, and having as its end the promotion of the welfare of the whole country.

In each case the primary object of the government was to advance its own interests—in the one to secure a vessel, and the other to secure a road which could be used for national purposes. In both, the person who commands and controls, who gives effect to this Congressional intent, is an agent or means to the end, and must be within the protection of the Federal Government, or the purposes and intent of that Government would be at the mercy of hostile legislation by the States.

The Transcontinental Roads Were Born of War.

The transcontinental road, dedicated now chiefly to the promotion of the peaceful arts, was born in war. It is true that a few of the prominent men of the nation had long looked forward to such a work; and that the people of California, forming an isolated community, had as early as May 1, 1852, through their Legislature, declared "that the interests of this State, as well as those of the whole Union, require the immediate action of the Government of the United States for the construction of a

national thoroughfare connecting the navigable waters of the Atlantic and Pacific Oceans, for the *purposes of national safety in the event of war*, and to promote the highest commercial interests of the Republic," *and granted the right of way through the State to the United States for the purpose of constructing such a road.* (Statutes California, 1852, p. 150.) Again, in 1859, the Legislature passed a resolution calling a convention "to consider the refusal of Congress to take efficient measures for the construction of a railroad from the Atlantic States to the Pacific, and to adopt measures whereby the building of said road can be accomplished." (Statutes Cal., 1859, 391.) And at the same session the Legislature memorialized Congress to pass a law *authorizing the construction* of such a road, and asking that lands be granted in aid thereof. (Statutes 1859, p. 395.) These various measures of the State of California are referred to, to show that in the judgment of the State the work was a proper one for the Federal Government, and national in its character. But nothing came of these acts and resolves. It was only when war, in fact, was at hand, that the National Government moved in the premises.

The Work a National One.

We have seen that the State of California had uniformly characterized the work as a national one. That Congress declared the purpose of the Act of 1862 to be "to promote the public welfare by the construction of said railroad and telegraph line, and keeping the same in

working order, and to secure to the Government at all times, but particularly in time of war, the use and benefit of the same for postal and military and other purposes." (Sec. 18, Act of 1862.) Here, then, we have the declaration of the legislative department of both State and Federal Government that the paramount purpose of the road is a national one; and that the means by which it was to be constructed and used were national means.

Judicial Construction.

We come now to consider how the judicial department of the Federal Government has construed the Pacific Railroad Acts, and what that department has said upon the question—whether the trans-continental road is a national machine, and the persons in charge of it agents of the Federal Government to carry into execution its lawful purposes—whether or not such persons have been selected by the General Government as means to the ends sought to be attained by the Pacific Railroad Acts. In the case of the *United States* vs. *Union Pac. R. R. Co.*, 91 U. S., 79, the Court say:

"Although a free people, when resolved upon a course of action, can accomplish great results, the scheme for building a railroad two thousand miles in length, over deserts, across mountains, and through a country inhabited by Indians jealous of intrusion upon their rights, was universally regarded at the time as a bold and hazardous undertaking. It is nothing to the purpose that the apprehended difficulties in a great measure disappeared after trial, and that the road was constructed at less cost of time and money than had been considered possible. No argument can be drawn from the wisdom that comes after

the fact. Congress acted with reference to a state of things believed at the time to exist; and in interpreting its legislation, no aid can be derived from subsequent events. The project of building the road was not conceived for private ends; and the prevalent opinion was that it could not be worked out by private capital alone. It was a national work, originating in national necessities, and requiring national assistance.

"The policy of the country, to say nothing of the supposed want of constitutional power, stood in the way of the United States taking the work into its own hands. Even if this were not so, reasons of economy suggested that it were better to enlist private capital and enterprise in the project by offering the requisite inducements. Congress undertook to do this in order to promote the construction and operation of a work deemed essential to the security of great public interests.

"It is true, the scheme contemplated profit to individuals; for, without a reasonable expectation of this, capital could not be obtained, nor the requisite skill and enterprise. But this consideration does not in itself change the relation of the parties to this suit. This might have been so if the Government had incorporated a company to advance private interests, and agreed to aid it on account of the supposed incidental advantages which the public would derive from the completion of the projected railway. But the primary object of the Government was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end—the securing a road which could be used for its own purposes. The obligations, therefore, which were imposed on the company incorporated to build it, must depend on the true meaning of the enactment itself, viewed in the light of contemporaneous history.

"It has been observed by this Court, that the title of an Act, especially in congressional legislation, furnishes little aid in the construction of it, because the body of the Act, in so many cases, has no reference to the matter specified in the title. *Hadden* vs. *The Collector*, 5 Wall., 110. This is true, and we have no disposition to depart

from this rule; but the title even, of the original act of 1862, incorporating the appellee, seems to have been the subject of special consideration, for it truly discloses the general purpose of Congress in passing it. It is 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes.' That there should, however, be no doubt of the national character of the contemplated work, the body of the Act contains these significant words: 'And the better to accomplish the object of this Act—namely to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes—Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or appeal this Act.' 12 Stat., p. 497. Indeed, the whole Act contains unmistakable evidence that, if Congress was put to the necessity of carrying on a great public enterprise by the instrumentality of private corporations, it took care that there should be no misunderstanding about the objects to be attained, or the motives which influenced its action.

"If it had been equally explicit in the provisions regarding the bonds to be issued in aid of the company, there would have been no occasion for this suit. But even in this particular, looking to the motives which prompted the act and to the objects intended to be effected by it, we do not think there is any serious difficulty in getting at the true meaning of Congress. The act itself was an experiment. It must be considered in the nature of a proposal to enterprising men to engage in the work; for, with untried obstacles in the way, there was no certainty that capital could be enlisted. If enlisted at all, it could only be on conditions which would insure, in case of success, remuneration proportionate to the risk incurred."

The object was "protection to the people" of the Pacific Coast. The road was viewed as a "national undertaking for a national purpose." It was a "military necessity." The project "was not conceived for private ends," It "originated in national necessities." "Profit to individuals" was contemplated, "but this consideration does not in itself change the relation of the parties." The "primary object of the Government was to advance its own interests." Individual co-operation was an incident—"a means to an end." That end the "securing of a road which could be used for national purposes." The Central Pacific Railroad Company was one of the "means" which Congress selected to secure the end. Congress charged it with the construction and maintenance of the road, gave it command of a national instrument, and the question now is: Does that corporation in the economy of government rank with and enjoy the immunities of the captain of a revenue cutter "on the Erie Station?"

Late Adjudications Defining the Relations which the Means or Instrumentalities of the General Government bear to the States.

The Union Pacific Railway Company, Eastern Division, is the corporation mentioned in section 9 of the Railroad Act of 1862, as the "Leavenworth, Pawnee and Western Railroad Company of Kansas." It was chartered by the Legislature of the Territory of Kansas, and subsequently by the State of Kansas. The Pacific Railroad Act of 1862 constituted it one of the companies which, in con-

nection with the Union Pacific and Central Pacific, was to construct and maintain the trans-continental road. To the Union Pacific Railroad, chartered by Congress, it bears the same relation as the Central Pacific, with this exception, that the provisions in the Act of 1864, section 16, which provides that the Central Pacific Railroad Company shall 'enjoy all the rights, privileges and benefits conferred by this Act upon the said Union Pacific Railroad Company" had no application to the Kansas company. After the road was completed through the State of Kansas the Legislature passed a law, laying certain taxes upon the tangible property of the company within the jurisdiction of the State. The payment of these taxes was resisted by the company, upon the ground that it was an agent of the General Government, and that a tax upon its property would retard, impede, burden and control the company in the discharge of its duties and obligations to the Federal Government. The issue thus made came before the Supreme Court of the United States for determination in *Thompson* vs. *The Pacific R. R.* (9 Wallace, 579). The question for determination, as stated by the Court, was: "Can the right of this road to exemption from such taxation (*i. e.* upon its tangible property) be maintained in the absence of any legislation by Congress to that effect?" (p. 589.) The Court, after reviewing the various cases bearing upon the question, say: "We fully recognize the soundness of the doctrine that no State has a right to tax the means employed by the Government of the Union for the execution of its powers, but we think

there is a clear distinction between a means employed by the Government and the property of agents employed by the Government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always nor generally taxation of the means" (p. 691). The Court determined that the tax levied by the State of Kansas being upon the property, and not upon the agency itself, was not within the immunity, and the Act of the Legislature of the State of Kansas was constitutional, and could be enforced. Some expressions in the opinion delivered by the Chief Justice in the case just cited led to the belief that the Court might maintain that there was a distinction between the property of the agent, if that agent was a State corporation, and the property of the agent, when that agent was a Federal corporation.

But in the case of *The Railroad Co.* vs. *Peniston*, 18 Wallace, p. 5, it was held that no such distinction existed, and that the question was not whether it was a Federal or State corporation, but that the immunity rested upon the fact that the person or corporation claiming it, had been selected by the General Government as an agent in the executiou of its powers. In that case the tax involved was one laid by the State of Nebraska upon the tangible property of the Union Pac. R. R., a corporation created by Congress. The Court in its opinion refers to the case of *Thompson* vs. *U. P. R. R. Co.*, 9 Wallace, and says: "It is true that in the opinion delivered by the Chief Justice, reference was made to the fact that the

defendants were a State corporation, and an argument was attempted to be drawn from this to distinguish the case from *McCulloch* vs. *The State of Maryland*" (p. 36). "But," say the Court, "when the question is as in the present case, whether the taxation of property is taxation of means, instruments or agencies by which the United States carries out its powers, it is impossible to see how it can be pertinent to inquire whence the property originated, or from whom its present owners obtained it. The United States have no more ownership of the road authorized by Congress than they had in the road authorized by Kansas. If the taxation of either is unlawful, it is because the States cannot obstruct the exercise of national powers" (p. 34). "There is no differenee which can be pointed out between the nature, extent or purposes of their agency and those of the corporation complainants in this particular case" (p. 33).

"As was said in *Weston* vs. *Charleston*, they (the States) cannot, by taxation or otherwise, 'retard, impede, burden, or in any manner control the operation of the Constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.' The implied inhibition, if any exists, is against such obstruction, and that must be the same, whether the corporation whose property is taxed was created by Congress or by a State Legislature."

Reference is then made by the Court to the fact that in *McCulloch* vs. *Maryland* the tax was upon the operation of the agent; that in the case of *Osborn* vs. *The Bank*, the tax was upon its right to transact business, and that a clear distinction was taken between the right of a State to tax the operation or existence of the agent, and a right to tax its tangible property within the jurisdiction of the State, and this distinction, says the Court, "so clearly drawn in the earlier decisions between a tax

on the property of a governmental agent and a tax upon the operation of such agent, or upon his right to be, has ever since been recognized." (P. 36.)

And again: "It is therefore manifest that exemption of Federal agencies from State taxation is dependant not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax—that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect; it leaves them free to discharge the duties which they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercises of the Federal power" (p. 37). And further: "In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thompson* vs. *The U. P. R. R. Co.* It is not imposed upon the franchises, or the right of the company to exist and perform the functions for which it was brought into being" (p. 37).

The cases last cited are in harmony with the earlier decisions, and also with the principle laid down in the case of the *Collector* vs. *Day*, 11 Wallace, 127, in which it said: "The exemption rests upon necessary implication, and is upheld by the great law of self-preservation, as any Government whose means employed in conducting its operations, if subject to the control of another

and distinct Government, can exist only at the mercy of that Government. Of what avail are these means if another power can tax them at discretion?"

The National Bank cases hold that it is competent for Congress, in the establishment and arrangement of these means and agencies, to concede to the State such measures and modes of taxation as Congress deems consistent with the safety and efficiency of these means and agencies to execute the powers of the General Government. That is, taxation not by predominance of State authority, but by virtue of Federal submission of the subject to State taxation upon motives of Federal policy. But this concession is not a judicial question. The judicial conclusion excludes the taxation of the Federal means and agencies, and requires the express assent of Federal authority, to support State taxation and fix its mode and its measure. (*Osborn* vs. *The Bank of U. S., supra.*)

In no subsequent case has the force of the reasoning or the weight of the authority of the cases of *McCulloch* vs. *Maryland* and *Osborn* vs. *The Bank of the United States*, been in the least abated, but on the contrary the principles established in those cases stand unbroken and impregnable.

In the *The Railroad Co.* vs. *Peniston* (18 Wallace, 5,) the Supreme Court, by the clearest implication, maintain that if the tax complained of in *Thompson* vs. *U. P. R. R Co.*, or the *Railroad* vs. *Peniston* had been imposed upon the franchise—the right of the company to exist—it

would not have been a tax within the province of the State Government to impose, but one prohibited by the Constitution of the United States. While upon this question the Court is unanimous, a majority determined that the tangible property of the companies, parties to those suits, was not within the immunity claimed, but the Court divided nearly evenly, the minority holding that the exemption extended not only to the existence and being of the agent, but to all of its property within the States.

Congress by Act of July 1, 1862, and an amendatory Act of 1864, devolved upon the Central Pacific R. R. Co., individually and personally, the power and duty of constructing, maintaining and operating the western division of the trans-continental railroad. That company can not divest itself of these powers and duties without the express consent of Congress. 1 McCrary's C. C. Repts., 192.

Wood vs. *Truckee Turnpike Co.*, 24 Cal., 486.
Thomas vs. *Armstrong*, 7 Cal., 286.
Monroe vs. *Thomas*, 5 Cal., 470.

The same Acts made it the duty of these companies to operate the trans-continental road as one continuous line. That duty can be, and in the case of the U. P. R. R. Co., Eastern Division, has been enforced by mandate. The privileges and duties of these corporations, derived from and due to the Federal Government, are, as we have seen, personal in their nature. They cannot voluntarily divest themselves of either; nor can the right to per-

form the same be transferred without the consent of Congress either voluntarily or by forced sale. How then can it be said that a State tax upon the right of either company to exist could be enforced without hindering, delaying or impeding the operations of the Acts of Congress in question.

Department No. 1, of the Supreme Court of California (*C. P. R. R. Co.* vs. *S. B., of Eq., 1882*), maintains that the right of the corporation to exist is derived from the State of California. Conceding that to be true, nevertheless Congress, under the power to make war, has the right to seize upon this State corporation, and convert it into an instrumentality or means to that end, and having done so, the existence of a power in the State to destroy that instrument cannot be admitted.

Let us take an illustration, not stronger, perhaps, than the case itself: Suppose that the Federal Government should acquire from the Government of Nicaragua the right to construct an inter-oceanic canal across its territory, and that Congress in its wisdom should declare the Central Pacific Railroad Company an agent of the Federal Government to construct that work, and should authorize the company to maintain the same and hold it upon demand, subject to the exclusive use of the United States for military purposes, would it be contended that the State of California could destroy the Central Pacific Railroad Company, and thus nullify the action of the Federal Government?

If the State should attempt the destruction of the company, and it should interpose in its defense the Act

of Congress, the question would not and could not be, whether the company was a Federal or a State corporation, but would be, whether or not the Federal Government had selected it as a means or instrument to carry into execution the powers granted to that government, and this question determined in the affirmative would, in so far as it derived its rights and privileges from the National Government, place the company beyond the reach of the attacks made by the State, either upon its existence or upon its operations.

In the opinion of the Supreme Court of California, some force is given to the fact that Congress has passed no Act exempting the property of the Central Pacific Railroad property from taxation. In *Osborn* vs. *United States Bank*,7 Wheat., 3 W., it was contended that Congress must declare the exemption from State taxation, and that it was not to be implied by the Court, but the Court held to the contrary. Indeed, Congress has no substantive power to exempt property from State taxation,and any provision to that effect in an Act of Congress would be inoperative.

The presence or absence of an exemption clause in the Act of Congress does not, and cannot affect the extent or operation of the Act of Congress. Congress has no power to revoke State laws. It legislates over subjects ; and over those subjects which are within its power its legislation is supreme, and necessarily overrules all inconsistent or repugnant State legislation. If the law of a State imposing a tax upon the franchise is opposed to

or inconsistent with any constitutional power which Congress has exercised, then, so far as the incompatibility exists, the law is nugatory and void, necessarily, and by reason of the supremacy of the law of Congress. The Constitution gives to them supremacy when State laws oppose them, and the only question is, whether there is, or is not, a repugnancy or hostility between the law of Congress and the law of the State. If it should be admitted that Congress, by express terms, could have exempted this franchise from State taxation, the whole argument is effectually given up, because such terms would add nothing to the effect and operation of an Act of Congress. If the tax be not inconsistent with—if it does not impede or affect the exercise of the powers of Congress, Congress would have no authority to exempt the franchise from its operation. If the tax is inconsistent with, or impedes or affects the exercise of the power, it is, as we have seen, for that reason alone, necessarily void.

A State law is powerless to take away, restrain, or abridge that which the Federal authority has lawfully given, and it is immaterial whether the privilege or immunity exists as an implication under some provision of the Constitution or laws, or is expressly declared and established. (Pomeroy's Const. Law, p. 248.)

The cases which we have cited upon this question are all ably reviewed by Mr. Justice Gray, delivering the opinion of the Court in *Van Brocklin* vs. *The State of Tennessee,* 117 U. S., 151.

The learned Justice says:

"While the power of taxation is one of vital importance, retained by the States, not abridged by the grant of a similar power to the Government of the Union, but to be concurrently exercised by the two governments, yet even this power of a State is subordinate to, and may be controlled by, the Constitution of the United States.

That Constitution and the laws made in pursuance thereof are supreme; they control the constitutions and laws of the respective States, and cannot be controlled by them. The people of a State give to their Government a right of taxing themselves and their property at its discretion. But the means employed by the Government of the Union are not given by the people of a particular State, but by the people of all the States; and being given by all, for the benefit of all, should be subjected to that Government only which belongs to all.

All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States."

Referring again to the Act of Congress under which this trans-continental road was built, and under which it is operated, we find this provision contained in the 6th section:

"That the grants aforesaid are made upon condition that said companies shall pay said bonds at maturity and shall keep said railroad and telegraph lines in repair and use and shall at all times transmit dispatches over said telegraph line and transport mails, troops, and muni-

tions of war, supplies and public stores upon said railroad for the Government whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid."

It cannot at this day be denied that Congress has the constitutional authority to enact this law. It has the express authority to establish post routes, and to make war, and by implication has power to do every act which may be necessary to carry into execution these express powers.

These powers are exercised not for the benefit of the people of any particular State, but for the people of all the States. They were given to Congress for the benefit of all and can be subjected only to the government to which belongs to all. Over neither of these subjects does the power of the State extend and therefore they cannot be the subjects of State taxation. The defendant, the Central Pacific Railroad, is bound by the Act of Congress to keep in repair and in use its line of railroad and telegraph. It is bound to transmit government messages over its telegraph lines, and transport over its road the mails, the troops, the munitions of war, supplies and public stores. These are in fact the great purposes for which Government aids were granted. That a State can tax the right to so use the road and telegraph line would seem not to admit of argument.

The learned Justice, pursuing the same subject, says:

"The attempt to use the taxing power of a State on the means employed by the Government of the Union, in pursuance of the Constitution, is itself an abuse, because

it is the usurpation of a power which the people of a single State cannot give. The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one Government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control.

The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner controls the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

In *Pollard's Lessee* vs. *Hagan*, 3 Howard, U. S., page 225, Mr. Justice McKinley, speaking for the Court, said:

"Every constitutional Act of Congress is passed by the will of the people of the United States expressed through their representatives on the subject matter of the enactment, and when so passed it becomes the supreme law of the land and operates by its own force on the subject matter in whatever State or Territory it may happen to be."

So far from it being necessary for Congress, when it selects the means through which the powers are to be executed, to declare that such means shall not be subject to State taxation and that the State shall do nothing to hinder or impede the operation of the law, it is extremely doubtful whether Congress could in any such case confer upon the State power to interfere in any way with the subject matter.

It is a serious question whether Congress could authorize a State to tax the means and instrumentalities of the Federal Government. If Congress could do this then it

is in the power of Congress acting in conjunction with the States to destroy the National Government. It could authorize a State or any number of States to impose such burdens upon the operations of the National Government as to render the operations impossible. If Congress can confer the power to tax the means employed by the Government of the Union, it can confer the power to destroy. For the power to tax involves the power to destroy.

That every constitutional Act of Congress becomes the supreme law of the land and operates by its own force upon the subject matter in whatever State or Territory it may happen to be, and that no State can in anywise interfere with such operations, seems now to be beyond the domain of argument.

In the case of *The Philadelphia and Southern Mail Steamship Company* vs. *The Commonwealth of Pennsylvania*, 122, U. S., 335, the question arose as to whether a State could constitutionally impose upon a Steamship Company, incorporated under its laws, a tax upon the gross receipts of such company, derived from the transportation of persons and property by sea, between different States and to and from foreign countries.

This question was answered in the negative upon the ground that the power to regulate commerce was a national power and that no State could by taxation or otherwise interfere with its exercise.

Mr. Justice Bradley speaking for the Court said: "The question which underlies the immediate question in the case is, whether the imposition of the tax upon the steamship company's receipts amounted to a regulation of, or an interference with, interstate and foreign commerce, and was thus in conflict with the power granted by the Constitution to Congress? The tax was levied directly upon the receipts derived by the Company from its fares and freights for the transportation of persons and goods between different States, and between the States and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was that and nothing else. In view of the decisions of this Court, it cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the State without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulations imposed by the States upon that branch of commerce would be a palpable interference. If Congress has not made any express regulations with regard to interstate commerce, its inaction as we have often held, is equivalent to a declaration that it shall be free, in all cases where its power is exclusive; and its power is necessarily exclusive whenever the subject matter is national in its character and properly admits of only one uniform system. See the cases collected in *Robbins* vs. *Shelby Taxing District*, 120 U. S., 489, 492, 493. Interstate commerce carried on by ships on the sea is surely of this character."

Again he says: "If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freights receivable for such transportation must equally belong to that power; and any burdens imposed by the State on such receipts must be in conflict with it."

In the case at bar the proposition is equally applicable. Congress under the power to declare war, under the power to establish post routes, under the power to promote the public welfare, selected these roads, these companies as the instruments of the Government. It is not only their right, but their duty to exist and to operate, and every burden imposed by a State on the right of these companies to exist, to operate and to carry into execution the powers conferred by Congress upon them must conflict with the national law from which those rights and powers are derived.

Again the Court say, quoting Chief Justice Strong, in another case:

"The State may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional it is not cured by including in its provisions subjects within the jurisdiction of the State."

Apply this principle to the case at bar and we may admit that the State may impose a tax upon the rights of The Central Pacific Railroad Company, obtained from the State but this fact does not authorize it to include within the tax the rights and privileges conferred upon the company by the National Government and for national purposes. It may be that the position could be maintained here that this tax is a tax upon interstate commerce. If the Court did not take judicial notice of the law, under which these roads were built, yet the existence of such laws are pleaded and found in the case. The Court will take judicial notice of the country; that this line of road is transcontinental; that it crosses the

line of States and Territories; that it is operated as one continuous line and that its operations include interstate commerce.

This position however would not advance the argument. It would simply be reasoning in a circle. The State is forbidden to interfere with interstate commerce because Congress has jurisdiction of the subject.

It is the jurisdiction of the National Government over the subject matter which renders all State laws affecting the same null and void.

Not more exclusive is the jurisdiction of Congress over interstate commerce than is its jurisdiction over post routes, and its authority to transport munitions of war and other military stores.

It is clear upon principle that the franchise to carry on interstate commerce can not be subject to taxation by the States.

The case last cited is conclusive upon that subject. Said the learned judge:

"It certainly could not have been intended as a tax upon the corporate franchise, because, by the terms of the act it was laid equally on the corporations of other States doing business in Pennsylvania. If intended as a tax on the franchise of doing business,—which in this case is the business of transportation in carrying on interstate and foreign commerce—it would clearly be unconstitutional."

We ask if it is not as clearly unconstitutional to impose a tax upon the business of transporting the government mails, upon transporting its munitions of war and

upon performing the duties imposed upon a corporation or person by the Government of the United States for any national purpose.

We quote further from the *Steamship Company* vs. *Pennsylvania:*

"Nor does it make any difference whether such commerce is carried on by individuals or corporations."

* * * * * *

"It is hardly necessary to add that the tax on the capital stock of the New Jersey Company, in that case was decided to be unconstitutional, because as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business was interstate commerce.

* * * * * *

But their business, as carriers in foreign or interstate commerce cannot be taxed by the State, under the plea that they are exercising a franchise.

* * * * * *

The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State; but in imposing such taxes, care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce *or any other matter exclusively within the jurisdiction of the Federal Government.*

This is a principle so often announced by the Courts and especially by this Court, that it may be received as an axiom of our constitutional jurisprudence."

Now, mark the language: "The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State, but in imposing such taxes care should be taken

not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, *or any other matter exclusively within the jurisdiction of the Federal Government.'*

Recurring again to the record—case No. 664, subdivision XXIX of answer, folio 48—the averment is as follows:

"Said pretended assessment made by the State Board of Equalization, is upon all of the franchises of defendant, and the said Board, in valuing the same, included the value of all the franchises and corporate powers held and exercised by defendant under said Acts of Congress."

The findings respond fully to the issue made by this averment and is as follows (finding XXX, folio 120):

"Said pretended assessment made by the State Board of Equalization, and the tax claimed is upon all of the franchises, the existence and operation of defendant, and upon all the franchises and corporate powers held and exercised by defendant, as well as its right to exist and operate."

The subject matter of the Acts of Congress under which the transcontinental roads were built were within the exclusive jurisdiction of the National Government. The principle of the case from which we have quoted at length, was the very principle which the defendants availed themselves of when the State attempted to interfere with and hamper the exercise by it of the powers which Congress constitutionally conferred.

To hold that the State of California may tax all of the franchises, the existence and operations of the Central Pacific Railroad and all the franchises and corporate

powers held and exercised by the defendant as well as to tax its right to exist and to operate, as a constitutional adn valid exercise of State power would be to overthrow the authority of every case cited upon the subject.

It would be to destroy an axiom of our constitutional jurisprudence.

The Defendant Derives Most of its Franchises from the General Government, and is to all Intents and Purposes a Federal Corporation.

We have in this argument treated the Central Pacific Railroad Company as a State corporation only. This is not true in point of fact, so far as it was organized under State laws it was with a capital of $8,500,000, and to build a road from Sacramento City to the eastern boundary of California, a distance of one hundred and fifteen miles. Under the operation of its California charter it could only borrow money to an amount not exceeding its capital stock, and must provide a sinking fund for the ultimate redemption of its bonds. The State granted no power to build any road except from Sacramento to the State line. By the Railroad Acts of 1862 and 1864 Congress granted it the right to build a road and telegraph line from San Francisco to the eastern boundary line of the State, and thence through the territories of the United States until it met the road and telegraph line of the Union Pacific Company, and gave to it other privileges and immunities of corporate character, which have been heretofore enumerated. In the Sinking Fund cases (99 U. S., 727,728,729,) the Supreme

Court of the United States, referring to the Central Pacific Railroad Company, expressly determine that these things were "additions" to the corporate power of the company, and say that "but for the *corporate powers and financial aid granted by Congress it is not probable the* road would have been built." It was upon this grant of corporate powers, franchises and immunities by Congress that the Court rested the authority of Congress to enact the "Thurman Bill." If this Court should hold that the immunity from taxation is in any degree dependent upon the source from which the corporate powers emanated, we have in the "Sinking Fund cases" the authoritative announcement of the Supreme Court of the United States that the franchise of the Central Pacific Railroad Company in part finds its source in congressional enactment, and that to the extent of the powers so conferred the franchise is a Federal franchise. This alone would render any scheme of State taxation of the franchise impracticable. How is that part of the franchise granted by the State to be segregated from that part granted by the General Government? Which part of the life of this being is at the mercy of the State? Upon which member of its body may the State Tax Collector execute his judgment of death? These would be pertinent questions if an attempt had been made to assess and tax *part* of the franchise of the company. But no such attempt has been made. The paltry considerations of "mine and thine" have not agitated the State Board of Equalization, but with characteristic audacity it has seized upon the whole.

Congress has recognized the Central Pacific as a Federal Corporation, Section 4 of the Act of April 10, 1869 (16 U. S. at large, p. 56), authorized the Attorney-General to investigate whether or not the charter and all the franchises of the U. P. R. R. Co., and of the C. P. R. R. Co., had not been forfeited.

The necessities of our case fall far short of requiring us to establish the national character of the Pacific Railroad Companies. With that character established, there could be no doubt that their franchises are exempt from State taxation, and that such is their character would seem to be no longer an open question in this court.

In discussing this question, in relation to the companies mentioned in the Acts of Congress chartering the Union Pacific, and which were to build the roads connecting with the eastern end of the Union Pacific (as the Central Pacific was to build the roads connecting with the western end), the Supreme Court of the United States, in the cases of the Pacific R. R. Removal Cases, 115 U. S. Rep., p. 1.

" Besides the legislation of Congress in reference to all the companies so consolidated, in the Acts of 1862 and 1864, and subsequent acts, all which is reviewed and commented on in the opinion of this Court in *Ames* vs. *Kansas* (111 U. S., 449), shows that all the said companies, before the said consolidation, had received large donations of land, subsidies, powers and privileges from Congress, and had accepted and were subject to important duties to the United States Government, and were

subject to a wide control of said Government, both in the construction and management of their roads and works; and one of said companies, to wit, the Union Pacific Railroad Company, was originally incorporated and organized under said acts, and was strictly a corporation of the United States, subject to the Acts of Congress, and having important duties to perform to the Government in the prosecution of its business. The facts that the last-named company is one of the constituent elements of the consolidated company, and that the entire system of roads now in its possession, and under its charge and control, constitutes one of the most comprehensive and important mediums of interstate commerce in the country, and that in all its transactions it is subject to the supervision and control of the Government of the United States, are sufficient, it seems to us, to bring the Kansas cases, as well as the other cases, fairly within the principle of the case of *Osborn* vs. *The Bank*.

And the Court further say, in the same opinion: "The whole being, capacities, authority, and obligations of the company thus consolidated, are so based upon, permeated by, and involved in the Acts of Congress referred to, that it is impracticable, so far as the operations and transactions of the company are concerned, to disentangle those qualities and capacities which have their source and foundations in these Acts from those which are derived from State or territorial authority." The same considerations are entirely applicable to the Central Pacific Railroad Company. In the case above

referred to, the point was distinctly made that defendant in error, the Kansas Company, must be regarded as having the same status as if it were still the Kansas Pacific Railroad Company, a corporation of the State of Kansas.

The Court, after remarking that this point had already received consideration, say: "But it may be added, as bearing on this particular case, that the original Kansas Company was authorized by the 9th section of the Pacific Railroad Act of July 1, 1862, to extend its road into the State of Missouri, that is, 'to construct a railroad and telegraph line *from* the Missouri River, at the mouth of the Kansas River, on the south side thereof (which is in the State of Missouri), so as to connect with the Pacific Railroad of Missouri, *to* the aforesaid point on the one-hundredth meridian of longitude,' namely, the point where the Union Pacific was to commence. This provision looked to the establishment of a continuous line of railroad from the Mississippi River, at St. Louis (the eastern terminus of the Pacific Railroad of Missouri), to the Pacific Ocean. The power assumed by Congress in giving this authority to the Kansas company was, undoubtedly, assumed to be within the power 'to regulate commerce among the several States;' and, although by an Act of the Legislature of Missouri, passed in February, 1865, the consent of that State was also given to the extension of the road into its territory, and to its connection with the Missouri road. The fact remains that the company claimed and assumed to exercise its

powers under the Act of Congress, as well as by the consent of the Legislature of Missouri."

The attempt of the State of California to levy a tax upon the existence of an agent of the National Government is a clear case of usurpation—an open defiance of the supremacy of the Federal Government as maintained in every adjudication made by the Supreme Court of the United States upon the subject.

POINT II.

That the Provisions of the Constitution and Laws of the State of California in Respect to the Assessment for Taxation of the Property of Railway Corporations Operating Railroads in more than one County are in Violation of the Fourteenth Amendment to the National Constitution, in so far as they require the Assessment of their Property at its full money value without making deduction as in the case of other corporations, and of natural persons for the value of the mortgages covering the property, assessed, thus imposing upon the defendant unequal burdens, and to that extent, denying to it the equal protection of the law.

A Corporation is a Person within the Meaning of the Fourteenth Amendment.

When this controversy first arose the State of California assumed the position that a corporation was not a person within the meaning of the Fourteenth Amendment, and, therefore, not entitled to its protection. Much time and learning were spent upon both sides in discussing this question, but the position taken by the defendant has been fully sustained by this Court.

When the case of *Santa Clara County* vs. *The Southern Pacific Railroad Company* (118 U. S. 394) came on for argument in this Court, Mr. Chief Justice Waite said:

"The Court does not wish to hear argument on the question, whether the provision in the Fourteenth Amendment of the Constitution which forbids a State to deny to any person, within its jurisdiction the equal protection of the law, applies to these corporations. We are all of the opinion that it does."

Had the Supreme Court of California in the beginning taken this view of the question, it is probable that none of these cases would have ever reached this Court.

McKinstry, Justice, delivering the opinion of the Supreme Court of the State of California in the case of *The Central Pacific Railroad Company* vs. *The Board of Equalization*, 60 Cal., p. 58, followed the opinion of Mr. Justice Woods, delivered, when a Circuit Judge, in the case of the *Insurance Company* vs. *The City of New Orleans*, and held that the word "person" in the Fourteenth Amendment did not include corporations. Said Mr. Justice McKinstry:

"It may be urged that there is no practicable difference between taxing railroad corporations at a higher rate or percentage upon the value of their property than is assessed upon the property of others, and establishing a mode of estimating the value of their property which results in the payment by them of more than is paid upon like property by others; but if this be true, are the provisions of the State constitution in conflict with the Fourteenth Amendment of the Constitution of the United States?"

He answers this question by holding that they are not in conflict because the word "person" in the Fourteenth Amendment, did not include corporations. Had he held to the contrary there would seem to be no question, judging from his statement of the case, that he would have

held, and the Court would have sustained him, that the tax was unequal and, therefore, prohibited by the Fourteenth Amendment.

The Supreme Court of California has never, in any of the cases referred to, decided that the scheme found in the State Constitution for the taxation of railroad property operated in more than one county was constitutional. In the case of the *People* vs. *Bd. Sup.*, of Sacramento, 59 Cal., 325, "if the Constitution is constitutional," and in *C. P. R. R.* vs. *Board of Equalization*, 60 Cal., 35, it held that a corporation was not a person and therefore could be discriminated against.

A.

The General and the Special System of Taxation, Under the New Constitution of California, Considered.—The Special System Violates the Rules of Equality, and Must Fall.

"An obligation rests upon every property owner to contribute his proportionate share to the support of the Government."

The System to Enforce this Obligation.

To enforce this obligation the Constitution of the State of California provides a system applicable to the great mass of property, the salient features of which are that all property shall be taxed in proportion to its value to be ascertained as provided by law (Art. XIII, section 1). That property shall be assessed in the county, city or district in which it is situated in the manner prescribed by law (Art. XIII, section 10). That the Boards of Super-

visors must equalize the valuation of the taxable property of the county (Art. XIII, section 9), and that a State Board of Equalization shall equalize valuations as between the counties. (Id.)

This system requires legislation to carry it into effect —the manner of assessment and the means by which the proportions are to be ascertained are left to legislation, except in so far as means for the latter purpose are found in the constitutional requirements relative to the Boards of Equalization. The legislation providing the manner of assessment, and the means of ascertaining proportions must be had in subordination to the constitutional provisions that "all laws of a general nature shall have a uniform operation" (Art. I, sec. 12), that "no local or special laws" shall be enacted "for the assessment or collection of taxes" (Art. IV, sec. 25, subdivision 10), that "privileges and immunities" shall not be granted to any citizen or class of citizens "which upon the same terms shall not be granted to all citizens," (Art. 1, sec. 21), and that no person shall "be deprived of life, liberty or property without due process of law." (Art. I, sec. 13.)

All of the safeguards compatible with the power involved are thrown around its exercise. The right of local self-government is acknowledged, for the assessment must be made by local officers. That each person is to pay a local tax in proportion to the value of his property, is admitted in the creation of a local board to adjust proportions. That the State tax is to be apportioned so

that equality is preserved between the taxpayers of different localities, a State Board has been created to adjust proportions between the localities ; but above all, the right of every person to be heard at some point of time before his liability becomes fixed is recognized as a fundamental principle.

DEPARTURE FROM THE SYSTEM.

Having instituted this system—co-extensive in its operation with the territorial limits of the power levying the tax and including withing its scope all kinds of property, the same Constitution provides: "The franchise, roadway, road-bed, rails and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, towns, townships and districts."

Franchises, roadways, road-beds, rails and rolling-stock, as separate and distinct classes of property, are not withdrawn from the operation of the general rule, for all such property, when owned by railroad companies, the roads of which are operated in a single county, are governed by the general rule.

Property situated partly in one county and partly in another is not as a class so withdrawn, for lands and houses so situated fall within the general rule.

Property operated in more than one county is not as a class so withdrawn, for telegraph lines, water ditches, flumes for transporting lumber for hire, stage and freight lines, turnpike roads, and other property so operated falls within the general rule.

If a classification based upon use is admissible, none such has been made, for all property used in more than one county has not been included.

If a classification based upon ownership is admissible, none such has been made, for all property owned by persons operating in more than one county has not been included.

Locomotives, as a species of property, are not to be assessed by the State Board; but whether they are to be so assessed is made to depend upon whether they are owned by given persons or corporations. In other words, the discrimination is, in part, between owners of the same species of property.

No class or genus or even species of property has been separated from the great mass and made subject to a special rule, but certain property has been taken out of the rule applicable to its species, and has been made, by reason of its ownership, subject to the special rule, and as to it, none of the safeguards thrown around the enjoyment of other like property have been preserved.

No local assessor may fix its value; no local board may consider it in adjusting proportions for local taxation. Its owner may not appeal to the local tribunal open to the owners of other property. (*State Board of Equaliza-*

tion vs. *Board of Supervisors of Sacramento County.*) The clause of the Constitution, which attempts to confer the whole power of valuation upon the State Board of Equalization, is arbitrary and self-executing. The Board may exercise its power unrestrained by the established principles of private rights and distributive justice.

DANGEROUS AND UNUSUAL POWERS CLAIMED.

The power of this board under the Constitution is strongly but accurately stated by the Attorney-General in his brief filed in the Supreme Court of California in the case of the *San Francisco and North Pacific Railroad Company* vs. *The State Board of Equalization,* (Brief, p. 11.) Says the learned Attorney-General: "There is nothing in the Constitution or statutes requiring such notice—(a notice of some kind to the property owner before his liability is fixed)—or pointing out specifically the manner to be pursued by the board in making assessments and fixing valuations. This being so, it may adopt such a mode of proceeding as appears to it suitable and proper. * * * If the board has adopted no general rules applicable to all cases, then whatever manner was adopted by the board to make the present assessment complained of became the rule of this case, the board having authority to make rules for its government can change such rules as often as it sees fit; can adopt a new rule for each case that comes before the board, if it desires so to do."

The Supreme Court of California, in the case above cited, fully sustained the position taken by the learned Attorney-General.

From the time of the establishment of James II of the "High Commission" to the time of the creation of the State Board of Equalization in California, no tribunal has existed either in England or America *which ever claimed* the right to deal with life, liberty or property, subject to no rules except those of its own pleasure, and changeable at its own will.

It becomes this Court to pause before giving ear to the monstrous pretensions of the State Board of Equalizations, voiced by the Attorney-General, and upheld by the Supreme Court of California. Nearly two centuries have elapsed since the unlimited power to deprive the citizens of property execpt in accordance with the "laws of the land" has been asserted in any country where the English language prevails. It is historical that the "High Commission" dared not enforce its judgments against property because an attempt to do so would enable the party injured to invoke the jurisdiction of the Common Law Courts. That the Solicitor-General shrank from facing such a Court, *packed even though it was,* with a claim that the "High Commission," in passing upon property rights, "could make rules for its own government, change such rules as often as it saw fit, and adopt a new rule for each case if it desired so to do."

Lord High Steward Jeffries' answer to the Bishop of London, descriptive of the powers of that tribunal,

"This Court does not proceed upon written allegation; its proceedings are summary and by word of mouth; no fixed mode of procedure; no rules of evidence govern its movements," is the same description which the Attorney-General gives of the powers of the State Board of Equalization. The existence of unlimited power, both the Attorney-General and Supreme Court of California feel, must be maintained, or all proceedings of the State Board of Equalization applicable to the case in hand must fall.

The provision of the State Constitution making the discrimination and conferring the power in question is obnoxious to the Fourteenth Amendment to the Federal Constitution.

1. It denies to persons within the jurisdiction of the State the equal protection of the laws; and

2. It deprives such persons of their property without due process of the law.

B.

The Provision of the State Constitution which Provides for the Assessment of the Property of Railroad Companies Operating in Two or More Counties, Denies to Such Companies the Protection of the General Rules Prescribed in the Same Constitution, and is Therefore Void.

The people of the United States have ordained (Sec. 1, Art. XIV, Const. of U. S.) that "No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States. * * * nor deny to any person within its jurisdiction the equal protection of the law."

These inhibitions upon the States apply "to all the instrumentalities and agencies employed in the administration of its government."

Ah Kow vs *Nunan*, 3 Sawyer, 157.

"It is doubtless true that a State may act through different agencies—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another."

Virginia vs. *Rives*, 100 U. S. R., 318;
Ex-parte Virginia, *id.*, 339 and 346.

The langue of the 14th Amendment, in so far as it deals with "privileges and immunities," is not new even to the Federal Constitution.

The Second section of Article IV of the Federal Constitution, declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

The section last cited has universally been held, among other things, to mean that the citizens of all the States shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the State in the same manner as the property of the

citizens of the State is protected, and that such property shall not be liable to any taxes or burdens to which the property of the citzen is not subject.

Campbell vs. *Morris*, 3 H. & McH,, 554.
Corfield vs. *Coryell*, 4 Wash., 361.
Ward, vs. *Morris*, 4 H. & McH., 338.
Wiley vs. *Palmer*, 14 Ala., N. S., 632.
Crandall vs. *State*, 10 Conn., 343.

To maintain the validity of the Constitution of the State of California in respect to the subject-matter of this action, it must be held that every other taxpayer in a county, except the parties in interest here, may apply to the local board of that county acting in a judicial capacity, to redress a wrong done by an assessor in the valuation of his property, or to relieve him of a burden not equally borne by others; but the parties in interest here cannot so apply. Can a law which admits of a proposition so monstrous be upheld in the very face of a constitutional provision which may be summed up in a single sentence—"The equality of all before the law."

The new Constitution of California (Art. II, Section 11,) provides that "all laws of a general nature shall have a uniform operation;" and in Section 21, Art. I, makes the declaration, "Nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." The language of these clauses which limit the power of the Legislature if we substitute the word "persons" for "citi-

zens" in the last clause would be the exact equivalent of the language of the 14th Amendment to the Federal Constitution, which limits the power of the States. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * nor deny to any person within its jurisdiction the equal protection of the laws."

If this proposition be correct we shall have but little difficulty in making the application to this case. To support it we have the judgment of the Court in *Brooks* vs. *Hyde*, 37 Cal., 376–7–8. That case arose under the old Constitution, and the question involved was the construction of Sec. 11, of Art. I, of that Constitution, "That all laws of a general nature shall have a uniform operation." In that case Mr. Justice Sanderson, delivering the opinion of and speaking for a majority of the Court said: (*Brooks* vs. *Hyde*, 37 Cal., pp. 376, 377 and 378.)

"Whatever of difficulty there may be in comprehending, when by itself considered, the precise office which this clause of our Constitution was designed to perform, it is removed when we read it in connection with the context of the Constitution, from which it was manifestly borrowed.

"As a matter of history, it is well known that our Constitution is in many respects copied from that of Iowa. Upon motion of Mr. Gwin, the Constitution of Iowa was adopted by the Constitutional Convention as a basis for ours, for the reason, as stated by him, that it was one of the latest and shortest. (Debates of Convention, p. 24.) The first article was reported by a committee of which Mr. Norton was chairman, and, as first reported, consisted of sixteen sections, including the one in question, bearing the same number which it now has. Speaking

of the report, Mr. Gwin said the first eight sections were from the Constitution of New York, and all the others were from the Constitution of Iowa. (Debates of Convention, 31.) So far as it goes, section eleven is a *verbatim* copy of section 6 of Article 1 of the Iowa Constitution, with the most important part left out. The latter section reads as follows :

"'SECTION 6. All laws of a general nature shall have a uniform operation ; the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.'

" Here the meaning of the first clause of the sentence, which, by reason of the 'glittering generality' of the language, when by itself considered, is obscure if not unintelligible, is explained and made clear by the latter clause, which serves as a definition to the first. The first clause is the shell, and the latter is the meat ; and it is a little surprising that our Constitutional Convention, if unwilling to take both should choose the former. Viewed through the medium of the latter clause, the meaning of the first is made so obvious that they may not have detected its intrinsic obscurity, and with a view to brevity, may have concluded to take the rule without its definition. However that may be, the meaning of the clause, as used in the Iowa Constitution, is obvious, and we must presume that when our Constitutional Convention borrowed the language they also borrowed the meaning, and designed that it should establish the same rule of legislative action which, by express definition, it is made to establish in the Constitution from which it was taken.

" I am, therefore, of the opinion that the true intent and meaning of section eleven of article first of our Constitution is to the effect that the Legislature shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. Thus interpreted, it affords a reasonable and salutary restriction upon legislative power, and, in my judgment, any other reading would render it meaningless and absurd."

Mr. Justice Crockett expressed no opinion and Mr. Justice Rhodes dissented. The reasons for his dissent are not given, but from his well-known views, it was not because the majority of the Court had held the rule too strict, but just the reverse.

In *Ward* vs. *Flood*, (48 Cal., 50,) Chief Justice Wallace, speaking for the Court, says: "The protection of law is indeed inseparable from the assumed existence of a recognized legal right, through vindication of which the protection is to operate. To declare, then, that each person within the jurisdiction of the State shall enjoy the equal protection of the laws, is necessarily to declare that the measure of legal rights within the State shall be equal and uniform."

In *Guy* vs. *Hermance*, (5 Cal., 74,) the Court say: "The Legislature * * cannot except one case or one party from the operation of a general rule of law, either as to the right *or as to the remedy*."

If these decisions are sound, it is clear that the clause cited from sec. 1, Art. XIV, of the Federal Constitution must be construed to mean precisely the same thing as the clauses cited from the State Constitution.

If we were here assailing a legislative enactment making the discrimination in question, it would be clear that the enactment could not stand in the face of sections 11 and 21 of Article I of the State Constitution.

These sections have no application to the valuation of, and taxation of, the property of railroad companies operated in more than one county; for it is said that the framers

of the Constitution intended to and did separate this property from the general mass of property in the State, and by the provisions of the last clause of section 10 of Article XIII of the State Constitution, applied a different rule to its valuation for taxation from what had been applied to other property in the State.

In this care the want of uniformity and equality in rights and privileges finds its source in the Constitution. It is the Constitution which gives to one person the right to appeal to a local board and denies the right to another. It is the Constitution which makes the other discriminations of which the defendant complains.

But this places the plaintiff in no better position, for if sections 11 and 21 of Article I of the State Constitution would in themselves and standing alone deny the power to the Legislature, it must follow, as a logical result that Section 1 of Article XIV of the Federal Constitution, which is in substance the equivalent of the sections of the State Constitution cited, has no less effect than to deny the power to the State.

The discriminations complained of are:

1. A different manner of assessment.

2. Denial of appeal to local board; and

3. That none of the safeguards which the law throws around the assessment and valuation of other property are applied.

C.

Assessment of the Essence of Taxation.

An assessment is of the very essence of taxation.

"*Levy* and *Assessment* have very different meanings. The levy of taxes is a legislative function, and declares the subject and rate of taxation."

Burroughs on Taxation, 194.

Cooley on Taxation, 244–5.

"Assessment is a quasi-judicial act, and consists in making out a list of the taxpayers and taxable property, and fixing its valuation for appraisement."

Hilliard on Taxation, 290.

The distinction is the difference between prescribing a rule of action and administering that rule to persons and subjects that fall within its provisions. * * * * * * * * A law which levies a tax and provides for its assessment will not justify the collection of a tax until the assessment is first made. To attempt otherwise would be equivalent to attempting to execute a levy against a person or thing before it has been judicially ascertained or determined that such person or thing was amenable to its provision. There must be an assessment, either made pursuant to the levy, or adopted as the basis of the levy, else there can be no lawful collection of taxes."

In Hilliard on Taxation, 291, it is said: "Assessment is so far an indispensable incident to taxation that no right of action arises until a legal assessment is made." So in Cooley on Taxation, 259, it is said, citing many authorities, that "of the necessity of an assessment no question can be made. Taxes by valuation cannot be apportioned without it. Moreover, it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities."

"An assessment made, as directed by law, is an indispensable basis for the support of the tax that may be levied upon it."

People vs. *Hastings*, 29 Cal., p. 451.

D.

There Must be Uniformity in the Mode of Assessment, as Well as Equality in the Rate of Taxation.

Cooley on Constitutional Limitations, 3d Ed., p. 622, says: "But whatever may be the basis of taxation, the requirement that it shall be uniform is universal. To render taxation uniform in any case, two things are essential: The first of these is, that each taxing district should confine itself to the object of taxation, within its limits. The second essential is, that there should be uniformity in the *manner of the assessment*, and approximate equality in the amount of exactions within the district." P. 624.

Every attempt to evade this rule must fail, no matter in what form the attempt is made.

In *Knowlton* vs. *Supervisors of Rock County*, 9 Wisconsin, 410, the facts were, that the City of Janesville included within its territorial limits not only the land embraced within the recorded plat of the village and its additions, but also a large quantity of adjacent farming or agricultural lands. The Legislature passed an act declaring that in no case should the real and personal property within the limits of the city, and not included within the limits of the recorded plat, be subject to an annual tax, to defray the current expenses of said city, exceeding one-half of one per cent. Under the charter of the city other property was liable to an annual tax of one per cent. The Legislature within the same taxing district undertook to provide that a portion of the property should be taxed at one rate in proportion to value, and another portion at a much lower rate.

"It was contended in argument," says the Court, "that as those provisions fixed one uniform rate without the recorded plats, and another within them, thus taxing all the property without alike, and all within alike, they do not infringe the constitutional provision of equality and uniformity; or, in other words, *that for the purposes of taxation the Legislature have the right, arbitrarily, to divide up and classify the property of citizens, and having done so they do not violate the constitutional rule of uniformity, provided all property within a given class is rated alike.*" "The answer to this argument is, that it creates different *rules* of taxation, to the number of which there is no limit, except that fixed by legislative discretion, while the Constitution establishes but one fixed, unbending, uniform rule on the subject. It is believed that if the Legislature can, by classification, thus arbitrarily and without regard to value, discriminate in the same municipal corporation, between personal and real property within, and personal and real property without, a recorded plat, they can also, by the same means, discriminate between lands used for one purpose and those used for another; such as lands used for growing wheat and those used for growing corn, or any other crop; meadow-lands and pasture lands, cultivated and uncultivated lands; or they can classify by the description—such as odd-numbered lots and blocks, and even-numbered ones; or odd and even-numbered sections. Personal property can be classified by its character, use or description; or, as in the present case, by its location, and thus the rules of taxation may be multiplied to an extent equal in number to the different kinds, uses, descriptions and locations of real and personal property. We do not see why the system may not be carried further, and the classification be made by the character, trade, profession or business of the owners. For certainly, this rule of uniformity can as well be applied to such a classification as any other, and thus the constitutional provision be saved intact. Such a construction would make the Constitution operative only to the extent of prohibiting the Legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a prop-

osition, to the ridiculous attitude of saying to the Legislature, 'You shall not discriminate between single individuals and corporations; but you may divide the citizens up into different classes, as the followers of different trades, professions or kinds of business, or as the owners of different species or descriptions of property, and legislate for one class, and against another, as much as you please, provided you serve all of the favored or unfavored classes alike;' thus affording a direct and solemn sanction to a system of taxation so manifestly and grossly unjust that it will not find an apologist anywhere, at least, outside of those who are the recipients of its favor. We do not believe the framers of that instrument intended such a construction, and therefore, cannot adopt it."

An enactment of the Legislature of the State of Arkansas for raising revenue to support the government of the State, among other things provided that a tax should be levied, first, on all lands within the State; and second, upon all town lots and improvements thereon, and provided that in valuing property in the first class, no reference should be had to the improvements thereon, but that all town lots and the improvements thereon should be included in the valuation. In *Pike* against the *State*, (5th Arkansas, p. 206,) the enactment in question was challenged, upon the ground that it conflicted with the provisions of the Constitution of that State, which ordained that "all property subject to taxation shall be taxed according to its value—that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State." Constitution of Arkansas, Art. VII, Title Revenue, sec. 2.

The Court said: "From the view which we have taken, not only of the provision above quoted, but of every part of the Constitution, we consider the rule there prescribed to be this, that property of every character and description upon which a State tax may be levied, must be taxed in proportion to its real and true value, and according to that basis be made to contribute to the revenue of the State; and that no portion of any distinct genus or species of property upon which such tax is imposed, can ever be exempt therefrom. Therefore, if such tax be at any time laid upon land, no lands within the limits of the State, except such as are or may be exempt by some authority superior to our State Constitution, can be legally exonerated from the imposition, and it matters nothing whether the land be situated in a city, town or village, or in one portion of the State or another; because the rule is general and inflexible, comprehending in such case all lands subject to the jurisdiction of the State, and liable to be taxed by her authority."

And again: "This rule we considered so great and comprehensive as to embrace every description of property upon which a tax may be laid to raise any portion of the State revenue. And the Legislature possesses no power to restrict its operation to such lands or improvements thereon, or to any other property subjected to such taxation as may be situated in any specified portion of the State, or in any sectional or legal division, or subdivision thereof, because no such restriction can possibly exist, if the tax imposed be equal and uniform throughout the State.

"Now it is equally certain that land, by being divided, surveyed or laid out into small parcels, tracts, or lots, and distinguished from other lands by the additional appellation of 'town lots,' does not, either in legal contemplation or in fact, change its original character or quality, or lose its original and still legal and appropriate name, but remains of the same genus or class of property to which it belonged before it was so divided, or had applied to it the additional name or designation, 'town lots.'"

In the *Exchange Bank of Columbus* vs. *Hines* (3 Ohio St. R., 15), it is said that "Taxing by a uniform rule requires uniformity, not only in the *rate of taxation, but also uniformity in the mode of the assessment upon the taxable valuation.* Uniformity in taxing implies equality in the burden of taxation; and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation. But this is not all. The uniformity must be co-extensive with the territory to which it applies. If a State tax, it must be uniform over all the State; if a county, town or city tax, it must be uniform throughout the extent of territory to which it is applicable. But the uniformity in the rule required by the Constitution does not stop here. It must be extended to *all property* subject to taxation, so that all property may be taxed alike equally—which is taxing by a uniform rule."

"A tax is equal and uniform which reaches and bears with the like burden upon all the property within the given district, county, etc. It bears the like burden when the *valuation of each parcel is ascertained in the same mode*—the mode prescribed by law—and when it is subject to the same rate of taxation as other property within the district, county, etc."

People vs. *Whyler*, 41 Cal., 335.

E.

No Appeal to Local Boards.

That there is no appeal to local boards of equalization has been determined by the Supreme Court of California.

State Board of Equalization vs. *Sacramento Co.*, Sup. Ct., Cal.

Department No. One, of the Supreme Court of California, in discussing the point that the system challenged

violates the 14th Amendment, says: "We are unable to see how the fact that the value of one kind of property is to be ascertained by one officer or board, and the value of another kind of property by another officer or board, each clothed with the duty and responsibility of ascertaining the actual value, can be held to operate a deprivation of legal protection to the owners of either kind of property."

In reply, we admit there might be two such tribunals established, each surrounded with the same safeguards, the operations of neither of which would amount to a deprivation of legal rights. But the State Board of Equalization does not answer the description, and we will endeavor to point out why, although the *declared* end of its proceedings and that of the local Boards are the same, viz.: the ascertainment of "actual values," yet the inevitable operations of the State Board is to deprive persons of property without due process of law.

At this point let me impress upon this Court that the validity of a tribunal to pass upon, laws which divest one of life, liberty, or property, is not to be determined by the fact that justice is the result at which the tribunal is directed to arrive, or is the declared purpose of the law.

No tribunal has ever been established; no laws have ever been enacted in a civilized country; no matter how arbitrary were the powers to be exercised, or how flagrant were the acts to be done under the laws, but the ends of each were declared to be the promotion of justice.

The barbarous clauses of the Missouri Constitution, which made outlaws of ministers of Christ, because, in obedience to the ordinances of their Master, they had sympathized with persons supposed to be guilty of political crimes, were enacted in the name of patriotism.

The tribunal, which but for the interposition of the Federal judiciary, would have murdered Milliken, was created to administer justice.

But to carry the argument of Department No. One, of the Supreme Court of the State of California, to its logical result, Milliken could not be heard to complain, because his rights were not passed upon by ordinary courts; for the tribunal which tried him was like the courts, clothed with the "duty and responsibility of vindicating the innocent, and punishing the guilty."

F.

The Provisions of the State Constitution Which Provide for the Assessment of the Property of Railroad Companies Operating in Two or More Counties, if Enforced, Would Deprive Such Companies of Their Property Without Due Process of Law.

Section 1 of Article XIV of the Federal Constitution declares:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

This is the mandate of the Federal Constitution. Let us try the provisions of the Constitution of California relating to revenue, by this supreme rule :

GENERAL SYSTEM.	SPECIAL SYSTEM.
1st—The Tenth section of the 13th Article except as to assessments of railroad property requires legislation to enforce it.	So much of the Tenth section of the 13th Article as provides for the assessment of railroad property is self executing and autocratic.
2d—The Statute enforcing the tenth section of the 13th Article requires all taxable property to be assessed by the local assessor at its full cash value. "Full cash value means the amount at which the property would be taken in payment of a just debt due from a solvent debtor."	Railroad property enumerated in the tenth section of the 13th Article, shall be assessed by the State Board of Equalization at its actual value. But "actual value" is not defined, nor is any rule prescribed for the government of the State Board in ascertaining or determining it.
No local or special law shall be made "for the assessment or collection of taxes." (Art. IV, sec. 25, sub. 10.)	Franchises, etc., shall be assessed under a special law. (Art. XIII, sec. 10.) And taxes may be assessed and collected by special laws.
No person shall be deprived of * * property without due process of law. (Act. I, sec. 13.)	The franchises, etc., of railroads operated in more than one county may be taken without due process of law, or, in other words, the liability of their owners may be fixed without notice or an opportunity to be heard. (Art. XIII, sec. 10.)
All persons may appeal from the Asssessor to the local Board of Equalization. (Art. XIII, sec. 9.)	The owners of railroads operated in two or more counties shall not appeal to the Local Board of Equalization. (Art. XIII, sec. 9.)
All property shall be assessed in the county in which it is situated, (Art. XIII, sec. 10.)	Franchises, etc., of railroads operated in more than one county shall not be assessed in the county in which they are situated. (Art. XIII, sec. 10.)
All property shall be assessed in the manner prescribed by law. (Art. XIII, sec. 10.)	Franchises, etc., of railroads operated in more than one county shall not be assessed in the manner prescribed by law, but shall be assessed in the manner prescribed by the State Board of Equalization. (Art. XIII, sec. 10.)

Indebtedness secured by mortgage may be deducted. (Const., sec. 4, Art. XIII.)	Indebtedness secured by mortgage shall not be deducted. (Decision of Department One.)
The law which prescribes the manner of assessment and the rules of evidence and notice must be made by the Legislature, and must be uniform in their operation. (Art. IV, sec. 25, sub. 10; Art. I, sec. 12.) The rules which this law prescribes must be predetermined. (Cooley on Constitutional Limitations, 4th Ed. T. P. 110, S. P. 91.	The law which prescribes the manner of the assessment of franchises, etc., of railroads operated in more than one county, and the rules of evidence relating thereto, must be made by the State Board of Equalization. They need not be uniform in their operation. A new rule can be adopted for each case. These rules need not be predetermined. It is at the pleasure of the Board to require notice or not. (Argument of Atty. Gen. in *S. F. & N. P. R. R.* vs. *State Board of Equalization*, p. 11.)

The owners of railroad property operated in more than one county are denied any protection from the laws, which

1. Require that property shall be taxed in *proportion* to its value.

2. Require such proportions to be ascertained by a general law.

3. Give an appeal from the assessor to another tribunal.

4. Require the assessment to be made in the county, and prevent its being made in localities distant from the *situs* of the property.

5. Which prescribe the mode and manner of the assessment; and

6. Which allow deductions for indebtedness secured by mortgage.

Each of which laws goes to the very essence of the taxing power.

No such discriminations have ever been attempted in any State. It is true that in some States laws exist for the ascertainment of the value of railroad property by tribunals differently constituted from the tribunals which ascertain the values of other property. But such tribunals have jurisdiction over *all railroad* property. The manner of their proceeding is regulated by laws analogous to the laws governing other tribunals exercising like powers—by laws which throw around the owners of such property every protection which the laws give to the owners of other kinds of property.

The distinctions between the Constitutional and statutory provisions of Illinois, discussed in State Railroad Tax Cases, 92 U. S. 75, and those above given, are so marked that the cases there decided ought not to be considered as at all applicable to the questions arising in these cases.

In *ex parte Denis Kearney* (55 Cal., 21), the Supreme Court of California quotes with approval the language of Campbell, J., in *Jackson* vs. *The People*, (9 Mich., 111,) that "the Constitution, in apportioning the judicial power *as well as in affirming the immunity of life, liberty and property, has always been understood to guarantee to each citizen the right to have his title to property and other legal privileges determined by the general tribunals of the State.*"

The masterly and comprehensive definition by Daniel Webster of the clause involved is, perhaps, the true one, and sustained with more unanimity by the author-

ities than any other: "By the *law of the land* is most clearly intended the *general* law—a law which hears before it condemns—which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of *general rules* which govern society."

Cooley on Constitutional Limitations, 3d Ed., p. 449.

"Every man is entitled to a certain remedy in the law for all wrongs against his person or his property, and cannot be compelled to buy justice, or to submit *to conditions not imposed upon his fellows*, as a means of obtaining it."

The terms *law of the land*, says Chief Justice Hemphill in *James* vs. *Reynolds*, 2d Texas, 251, "have often been construed and somewhat variously defined. They are now, in their most usual acceptation, regarded as general public laws, binding upon all the members of the community under all circumstances, and not partial or private laws affecting the rights of private individuals, or classes of individuals."

Upon this topic Judge Cooley, after a review of the authorities, remarks: "As to the safeguard law of the land in tax proceedings, neither the practice of governments nor the decisions of Courts warrant us in saying that it includes a judicial finding of delinquency before a sale can be made. *It means*, beyond any question,

regular and orderly proceedings, under the *general law*, by the proper department of government; and means nothing more."

Cooley on Taxation, Note 2, pp. 40 and 41.

This brings us to the consideration of what a general law is.

In Potter's Dwarris, the division of statutes noticed is that of general or public acts, and such as are special or private. The most comprehensive, if not the most precise definition, is that given by Dwarris: "That public acts relate to the public at large, and private acts concern the particular interest or benefit of certain individuals, or particular classes of men." Potter's Dwarris, 52.

"General laws are those which relate to or bind all within the jurisdiction of the law-making power, limited as that power may be in its territorial operation or by constitutional restraint."

Sedgwick on Stat. & Con. Law., p. 30.

"The general description of public acts is that they relate to or concern the interests of the public at large, or relate to a general *genus* in relation to things, and private acts relate to private individuals, or an individual only, or which concern a particular *species* of such general *genus* or things."

Smith on C. Const., sec. 795, p. 913.

The rule "requires that any general law must be as broad as the subject matter to which it relates."

Desmond vs. *Dunn*, (McClure Charter,) 55 Cal., 252.

"It may be true that it (the law) bears equally upon all to whom it is applicable, but this does not make it a general law, for if that was the test there could be no special laws." (McKinstry J., in *ex parte* Westerfield, Supreme Court of California, August 20th, 1880.)

In *Van Zandt* vs. *Waddell* (2 Yerger, Tenn., 268), it is said, "that a law which is partial in its operation, intending to affect particular individuals alone, or to deprive them of the benefit of the general laws, is inhibited by the Constitution, and is void." The learned Judge Catron, in the same case, remarks: "That a partial law, tending directly or indirectly to deprive a corporation or an individual of rights to property, or to the equal benefits of the general and public laws of the land, is unconstitutional and void, we do not doubt." And again: "The right to life, liberty and property of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land in similar circumstances, and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies that lead to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

The provision of the Constitution of the State of California which we have been considering, and to which we object, is one which does provide, in effect, not that all corporate bodies, but that certain corporate bodies shall be governed by one rule, while the mass of the community, who made that Constitution, shall be governed by another.

Justice Catron, proceeding, says: "The idea of a people, through their representatives, making laws whereby are swept away the life, liberty and property of *one* or of a *few* citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of Magna Charta in England, securing the subject against odious exactions, which is, and for centuries has been, the foundation of English liberty. Its infraction was a leading cause why we separated from that country; and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason of its adoption as part of our Constitution."

The provision of the Constitution to which we object is, in effect, that the valuation of the property of a few corporations shall be made by a State Board of Equalization, which may assemble at any time or place within the State; may act without evidence and without notice; and from the action of which, according to the theory of the Attorney-General, there is no appeal. This makes a case within the very reason of the rule as it is expounded by Judge Catron.

Of all the members of that Constitutional Convention it is not to be presumed that there was a single one who would have been willing to be bound by such a rule applied to his own property ; and of all the constituents of those members it may be said without extravagance, that not one would have assented to his property being valued by such a tribunal. We have here, then, in the shape of a constitutional provision, a law under which might be swept away the property of all the corporations or persons affected, but by which neither the representatives of the people who framed the provision nor the constituents, would be willing to be bound. We have such a provision made applicable to the property of the defendants, which Justice Catron characterizes as "too odious to be tolerated in any government where freedom has a name."

Wally's Heirs vs. *Kennedy*, 2 Yerg., 554, was an act of ejectment brought by the heirs of Wally against the defendant, claiming the land in controversy as a reservation, by virtue of the treaties of 1817 and 1819 with the Cherokees. The material question involved was this: On the trial below, the defendant proved that the suit was prosecuted for the benefit of another, and not the lessors of the plaintiff, who had contracted to convey their interest before the suit was brought.

On this point the Court charged the jury, "that if they believed the lessors of the plaintiff had sold their interest in the land in dispute, they must find a verdict for the defendant." The jury accordingly found a verdict for the defendant. The charge of the Circuit Court

was grounded on the Act of 1827, ch. 39, passed December 6th of that year. A suit was commenced on the 27th of August, 1827. The Act provides, among other things, that the defendant, on the trial of the cause, might prove by witnesses that the suit was instituted or prosecuted, in whole or in part, on a contingent interest, or in trust for any other person than the one in whose name the suit was brought, and if the fact should so prove on examination, it would operate as a bar to the recovery of the plaintiff. Judge Catron delivered the opinion of the Court, holding that this Act was a partial law, that the treaty between the United States and the Cherokee Nation of Indians secured to the reservees the right of citizenship, and that, of course, in 1827 they held the same relation to the body politic, and were entitled to the same measure of constitutional protection as the citizens of Tennessee, and he inquires, "Does that part of the Act of 1827, which declares that the suit shall be barred if the defendant prove it was prosecuted in trust for another, violate the Constitution?" and, answering this inquiry, proceeds: "By this—the Constitution—it is declared that no free man shall be disseized of his freehold, or deprived of his property, but by the judgment of his peers or the law of the land. What is the 'law of the land?' This Court, on two occasions, and upon the most mature consideration, has declared the clause 'law of the land' means a general, public law, equally binding upon every member of the community. The rights of every individual must stand or fall by the same rule or law that governs every other member of the

body politic or land under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void." And here he quotes with approval from his own opinion in the case of *Van Zandt* vs. *Waddell.*

The objection to the Act in *Wally's Heirs* vs. *Kennedy*, was that it was limited in its operation to a comparatively small section of the State, and to a very few individuals, claiming a very small portion of the section of the country referred to.

"The Act," says the learned Judge, "was intended to drive from the Courts of Justice a few odious individuals, who, it was supposed, had speculated upon the ignorance and necessities of the Indian reservees, and fraudulently obtained their claims for trifling considerations, and were corruptly obtaining evidence to establish rights to reserves, where the Indians, in fact, never had any, to the prejudice of purchasers from the State. If the supposed facts did exist, there was good cause for public indignation, but none for a violation of the Constitution by the passage of a law affecting the rights of a few individuals, but by which the great body of the people, or the legislators themselves, were unwilling to be bound. The part of the Constitution referred to, was intended to secure to weak and unpopular minorities and individuals equal rights with the majority, who, from the nature of our Government, exercise the legislative power."

The Court in *Wally's Heirs*, as we have observed, held the Act unconstitutional, because it was partial in its operation, applying to a comparatively small section of the State, and to but few individuals therein.

In *The State Bank* vs. *Cooper*, 2 Yerg., p. 599, an Act of the Legislature of Tennessee of 1829, ch. 95, directed a Court to be holden at Nashville, to consist of a Judge of the Supreme Court, a Chancellor and a Judge of the Circuit Court with power and authority, upon complaint by the bank, to hear and determine all causes against the officers of the bank and their trustees, and against persons who might be overchecked, and therefore become defaulters to said bank: it will be seen that the Act of 1829 differs from the Act considered in *Wally's Heirs* in this respect: in the latter case the Act referred to a small section of the State, while in the former it refers to a portion of the people or corporations of the State.

Green, a Judge of the Supreme Court; Peck, a Judge of the Circuit Court, and Judge Kennedy, the person referred to in the Act of 1825, and who were to hold the Court directed by that Act, in pursuance thereof, at the appointed time, met at Nashville, organized and appointed their clerk. The bank, under the provisions of the Act, commenced the suit against Cooper. The defendants plead that Jacob Peck, Nathan Green and William E. Kennedy had no power or authority to hear, try and determine said complaint; nor had they jurisdiction thereof. In support of this plea several constitutional grounds were taken, only one of which (the fifth) it is necessary here to take notice. That was, that

the law was partial in its operation, and for that reason was not a law of the land. Each of the judges delivered an opinion, and all agree that the fifth point was well taken. An extract from the opinion of Judge Peck, p. 613, fairly presents the view taken by all of the judges: "Is the Act on its face partial in its provisions, and personal in its application, affording advantages to one side and withholding them from the other, by such provisions as are found not to apply to other portions of the community, besides those specified in the Act? This is a delicate question. I am confident that the framers of the law did not intend that the Act should be subject even to such a suspicion, but times do arise when men are hurried into measures, which, on cool deliberation, they might themselves condemn. Putting intentions aside, what are the provisions of this Act? It provides that, touching a few individuals, the Court should, by summary process, call them before the judges, and fix, at pleasure, the time of their appearance; put interrogations to principals in bonds, hear testimony, adjudge and award execution against both them and their securities for breaches of trust, indebtedness and malfeasance in office. All this the judges are empowered to do by this Act, without regard to form or substance. * * * The duty assigned to this Court is aside from the duty belonging to its members as judges; the Act relates to the few specially named in it; the rules by which we are to be governed are not those common to the rest of the community; the right of trial by jury is made discretionary, if not absolutely taken away by the Act, and

the right of appeal is taken away in express terms. Under these circumstances is the law of the land likely to be afforded to the defendants? When I am acting under the Constitution of my country, and the equal distribution of rights becomes a question, I am not to forget that our ancestors knew, before the making of our Constitution, that when a Sidney was to be tried a Jeffries had to be selected. Weak and feeble as my walk may be in the station I occupy, it shall be my endeavor to move with even-handed justice. The franchises of the State might become dangerous engines in the hands of the crafty, if judges could be moulded to meet exigencies."

Now, it will be observed that the objection taken to the Act involved in the *State Bank* vs. *Cooper* was, that touching a few individuals the Court should, by summary process, call them before the judges. Our State Constitution provides in effect, that touching a few individuals, their rights and interests shall be determined by judges who are not even required to call the persons interested before them. Another objection taken before the Court in the Tennessee case was that the Act gave the judges power to fix, at pleasure, the time of the appearance of the persons to be affected. Our Constitution goes further, because even the right of appearance at any time is not given. In the Tennessee case the Court was required to be governed by the rules of law and equity: under our Constitution the State Board of Equalization may act independently of all rules, save those of its own making. In Tennessee the Court was supreme in its own

sphere of action, and from its judgment there could be no appeal: so it is said of our State Board of Equalization. In the Tennessee case the rules by which the Court was to be governed were not those common to the rest of the community: so in this case. In the Tennessee case the right of trial by jury was discretionary: in this case there is no trial.

Considering the whole matter, and turning it as we may, the provisions of our State Constitution, which authorize the State Board of Equalization to fix the value of the property of a few corporations, is more obnoxious to the Federal Constitution than were the provisions of the Act of the State of Tennessee to a similar provision in the Constitution of that State.

To the three cases cited from Yerger, we earnestly call the special attention of this Court. They were decided by able judges, after mature deliberation and upon principles which are entirely applicable to the case at bar.

There were at the time of the adoption of the new Constitution but a few companies operating railroads in more than one county in the State of California. The circumstances attending the adoption of Section 10 of Art. XIII of that Constitution being matters of common notoriety, are therefore supposed to be within the knowledge of the Courts. These circumstances all indicate that it was the intention of the framers of that section to single out these few companies, and apply to them a rule which they would not have thought of applying to the community at large.

No express words that could have been used in the

Constitution could limit the operation of the section in question more absolutely and definitely to such companies than those employed. The obligations of the Federal Constitution can not be so evaded.

Devine vs. *Cook County*, 84 Ills., 592.

The section in question may masquerade in the garb of a general rule, but the disguise is too transparent to deceive for a moment the eye of justice. Courts clothed with power to enforce the sanctions of the Constitution will not hesitate to penetrate the shadow of the words, and seize and do judgment upon the substance.

G.

To Allow One Person to Deduct the Value of a Mortgage Upon His Property, and Deny this Right to Another, is the Equivalent of Taxing the Latter at a Higher Rate Than the Former.

Sec. 1, of Art. XIII, of the Constitution of California, provides in substance that all property in the State shall be taxed in proportion to its value, and in defining the word *property*, as used in the section, declares that it includes moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal and mixed, capable of private ownership. If this section stood alone, it would be clear that the full value of a tract of land must be assessed against its owner, notwithstanding the fact that it was mortgaged for its full value to secure an indebtedness due from the owner to

the holder of the mortgage ; and it is clear, also, that under this section, standing alone, the credits secured by the mortgage must also be taxed at its value to the owner of the mortgage. This is double taxation. The decisions of the Supreme Court of California, rendered after the discussion had gone on for many years, and after full and eleborate arguments, settle that point.

Savings and Loan Society vs. *Austin*, 46 California, p. 415.

Burke vs. *Badlam*, 57 Cal., 600.

The decision in the case of the *S. & L. Soc.* vs. *Austin* antedates the formation of the new Constitution.

The debates in the Constitutional Convention show clearly that the members of that body were thoroughly conversant with the effect of that decision, and that to avoid double taxation as to all other persons except railroad and other *quasi* public corporations, it inserted the provisions which are found in Sec. 4 of Art. XIII, of the new Constitution, and which provide that a mortgage, deed of trust, contract or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby ; that they should be so deemed and treated, except as to railroads and other *quasi* public corporations, and that except as to such corporations, the debt so secured should be deducted from the value of the property upon which the security rests. No clearer case of intentional discrimination could be made. That it

was the intent and purpose of the framers of that Constitution to impose double taxation, not only upon the railroad property, but upon all other property, real and personal, owned by such corporations, is established beyond even the possibility of a doubt. Department One, of the Supreme Court of California, in its opinion filed in the case of the *Central Pacific Railroad Co.* vs. *The State Board of Equalization* (60 Cal., p. 35), concedes that there is no practical difference between a system which taxes the property of railroad corporations at a higher rate of percentage upon the value than is imposed upon other property, and a system which establishes a mode of estimating the value of such property which results in imposing a burden upon such property greater than is imposed upon other property.

The Supreme Court of California was either compelled to make this concession or to disregard its own decisions upon that subject. In *Miller* vs. *Heilbron*, 58 Cal., 133, the Supreme Court of California, in construing the Act of Congress conferring upon the States power to tax National Banks, and limiting the power conferred by a provision "that taxation must not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of that State," adopted the construction of the Supreme Court of the United States, in the case of *The People* vs. *Weaver*, 100 U. S., 543, namely: that the phrase the "taxation shall not be at a greater rate than is assessed upon other moneyed capital," etc., means something more than that there should be no discrimination with respect to percentage,

on any valuation which might be made; that it means in taking the assessment, rate of assessment and valuation together, the taxation on shares of National Banks should not be greater than on other moneyed capital.

In the case of *Miller* vs. *Heilbron*, the facts were, that the Assessor, in making the assessment against the plaintiff's shares of stock in a National Bank, was obliged to pursue the method prescribed in Sec. 3640 of the Political Code, and could not, under that section, deduct from the valuation of such shares debts due from the plaintiff to citizens of the State.

The Court held that the section under which the Assessor acted constituted clearly a discrimination against the owner of National Bank shares, and in favor of the owner of credits, and that the former was assessed at a greater rate than the latter. Referring to the Act of Congress which permitted the State to assess shares of stock in National Banks, under certain restrictions, it held that the restrictions operated upon the State Legislature, and that the fact, whether in a particular instance the owner of National Bank shares owes any debts, is immaterial, for, say the Court, "By the laws of this State, he is not permitted to deduct them, if he does."

Section 3640 of the Political Code, under which the assessment in question was made, violated the rule of equality and uniformity prescribed by the Act of Congress, for which reason the Court held that it neither had nor could have any force or effect against any one.

This Court is bound by the construction placed by the

Supreme Court of the State of California, in *Miller* vs. *Heilbron*, upon the laws of California, and when we apply the principles of that decision to the case in hand, and read Sec. 4 of Art. XIII, in their light, we must arrive at the conclusion that section four, in effect, declares that all property belonging to railroad and other *quasi* public corporations shall be assessed at a greater rate than other property of the same kind, is taxed. This Court need not consider the question whether this makes an unjust and illegal discrimination against such corporations, for that matter has already been authoritatively determined by the Supreme Court of the State of California.

If the Fourteenth Amendment to the Constitution of the United States, or the first section of the Civil Rights Bill, or the fundamental principles which underlie our form of Government, limit the power of taxation to the imposition of burdens upon some rule of equality and uniformity, it follows, that any law, whether it be in the form of a statute, or in the shape of a constitutional enactment, which violates the rule of equality and uniformity, must fall.

In support of *Miller* vs. *Heilbron*—if support it needs—I cite the well-reasoned case of the *National Albany Exchange Bank* vs. *Wells*, 18 Blatchford's Circuit Court Repts., 478.

On this point we refer to the elaborate briefs and arguments on file in the Santa Clara and San Mateo cases, and to brief and arguments of other Counsel in this case.

Independent of Constitutional Restrictions, all Taxes Must be Apportioned According to Some Rule of Equality and Uniformity.

"We hold these truths to be self-evident: That all men are created equal: that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that, to SECURE these rights, governments are instituted among men, deriving their JUST powers from the consent of the governed: that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."

"*Resolved*, That a right to liberty and property (which are the natural means of self-preservation) is absolute, inalienable, and can never be lawfully given up by ourselves, or taken from us by others."—*Mendon Resolutions, adopted at Mendon, Mass., in 1773.* (*See Bryant's History U. S., vol. 3, p.*—.)

This limitation upon the taxing power finds a resting place in the fundamental principles which underlie our republican form of Government, and therefore cannot lawfully be removed, either by the Government or by the people, for, as we shall hereafter see, the right of property is BEFORE and HIGHER than any Constitutional sanction; and arbitrary power exists over it nowhere in this Republic.

The American Constitutions were ordained and established, not to *confer* rights *upon* the people, but to *secure* rights which already existed, and many of which—for instance the right to life, liberty, and property—were *inalienable*.

To "*secure* the blessings of liberty to ourselves and our posterity," was a declared purpose of the framers of the Federal Constitution, and to "*secure* and perpetuate" the blessings of freedom, our State Constitution was established. While both Constitutions expressly

recognize the existence of inalienable rights, among which are those of "enjoying and defending life and liberty, and acquiring, possessing and protecting property," and both provide "that no person shall be deprived of * * property without due process of law." (Federal Constitution, Art. V. amendments; State Constitution, Art. 1, Sec. 13.)

"In considering State Constitutions," says Mr. Cooley (Cooley on Const. Lim., pp. 36–37), "we must not commit the mistake of supposing that because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the power of the rulers, but they do not measure the rights of the governed. What is a Constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, or the origin of private rights; it is not the fountain of law or the incipient state of government; it is not the cause but the consequence of personal and political freedom; it grants no rights to the people, but is a creature of their power, the instrument of their convenience. *Designed for their protection in the enjoyment of the rights and powers which they possessed before the Constitution was made, it is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits and modes of thought.* There is nothing primitive in it; it is all derived from a known source. It pre-supposes an organized society, law, order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard against the encroachments of tyranny. A written Constitution is in every instance a limitation upon the powers of government in the hands of agents."

Referring to the very power involved in this discussion—the power of taxation—Mr. Justice Miller, deliv-

ering the opinion of the Court in the case of the *Loan Association* vs. *Topeka* (20 Wallace, 662), says: "It must be conceded that there are rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is, after all, but a despotism. It is true a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if any man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many." And again (Id. p. 663): "*There are limitations on such power* which grow out of the essential nature of all free governments—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

MR. KNIGHT says: "In our time a French writer has recorded that after attending a debate in the House of Commons, he observed to an English statesman that he had heard no assertion of the general principles of constitutional freedom. The answer was, 'we take that for granted.'" (Knight's England, vol. 3, p. 417). And MR. COOLEY, in considering the nature and extent of State Constitutions, admits that "many of the most important principles of government are usually not declared at all, but simply taken for granted." (Note 1, Cooley's Const. Lim., p. 41.) In discussing the limitations upon the taxing power, he observes (Cooley on Const. Lim., 41): "Vast as is the power of the Government to levy taxes upon its citizens, there are nevertheless limitations upon it of a very distinct and positive character, *which inhere* in the very *nature of the power itself*. Some of these limitations are commonly declared in the written Constitu-

tions, but the declaration is rather from abundant caution than from any necessity, *as the limitations are equally imperative herewith, thus declared or not.*"

In Angell & Ames on Corporations (sec. 436) it is said: "In this country, though the right to impose taxes is inherent in the Legislature, and extends to subordinate communities, as counties, cities, towns, etc., yet it is not admitted to be omnipotent, *it being limited and controlled by certain principles that lie at the very foundation of our civil and political institutions.* The principle that the right cannot properly exist without representation was a fundamental ground of the American Revolution. But it is not sufficient that no tax or imposition can be imposed upon the citizens of the United States, unless by their representatives in the Legislature, or by their representatives which constitute the government of a county, town, etc.; but every person, natural and corporate, is entitled to require of the law-givers that taxation be *fair* and *equal* in proportion to the value of his or their property; and that no one class of individuals should be unjustly assessed."

And Mr. Chancellor Kent says: "Every person is entitled to be protected in the enjoyment of his property, not only from invasions of it by individuals, but from all *unequal* and *undue assessments* on the part of Government. It is not sufficient that no tax or imposition can be imposed upon the citizens, but by their representatives in the Legislature. The citizens are entitled to require that the Legislature itself shall cause all public taxation to be fair and equal in proportion to the value of his or their property so that no class of individuals, *and no one species of property may be unequally or unduly assessed.*"

2 Kent, 331–332.

MR. POTTER (1 Potter on Law of Corporations, sec. 217, p. 192): "Whatever limitations exist upon the legislative authority to wield its full scope in the taxing power of the State at its will, *must be sought in the nature of the*

power itself as thus briefly expressed, and in the express or implied restrictions of the National and State Constitutions. Taxation IMPLIES, as we have seen, an imposition for a *public use;* and it also IMPLIES that the imposition shall be upon a system of apportionment, so as to secure uniformity among those who are, or ought to be, subject to the particular tax; and hence we may readily conceive of Acts of the Legislature demanding sacrifices of citizens which could not be sustained as legitimate exercises of the taxing power, *although no specific provision of the Constitution should be infringed.*"

In the case of Washington Avenue (69 Penn. St. R. 362), AGNEW, J., delivering the opinion of the Court, says: "There is no case in our books wherein the legislative power to tax has been maintained with greater vigor and ability than *Sharpless* vs. *The City of Philadelphia*, 9 Harris; yet even there the Chief Justice admits (p. 166) that the exercise of the power may be forbidden by clear implication as well as express restriction. 'It is not every Act the Legislature may choose to call a tax law that is constitutional.' 'The whole public burden,' he contends, 'cannot be thrown on a single individual, under pretence of taxing him.' This is a concession that taxation has a limit, *per se*, and is not always co-extensive with legislative exaction. When, therefore, the Constitution declares, in the ninth article, that among the *inherent* and *indefeasible* rights of men is that of acquiring, possessing and protecting property—that the people shall be secure in their *possessions* from *unreasonable seizures*—that no one can be deprived of his *property* unless by the judgment of his peers or the law of the land; that no man's *property* shall be taken or *applied* to public use without *just compensation* being made; that every man, for an injury to his *lands or goods* shall have remedy by *due course of law*, and *right* and justice administered without sale, denial or delay; and that no law impairing contracts shall be made; and when the people, to guard against the transgressions of the higher power delegated by them declared that these rights are excepted

out of the general powers of government, *and shall forever remain inviolate*, they, for their own safety, stamped upon the right of private property an inviolability which cannot be frittered away by verbal criticism on each separate clause."

"There is a clear implication from the primary declaration of the inherent and indefeasible right of property, followed by the clauses guarding it against specific transgressions, that cover it with an ægis of protection against all unjust, unreasonable and palpably unequal exactions under any name or pretext. Nor is this sanctity incompatible with the taxing power or that of eminent domain, where, for the good of the whole people, burdens may be imposed or property taken.

"I admit that where the power to tax is unbounded by an express limit in the Constitution—that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good, further than all derive benefit from the purpose to which it is applied. But, nevertheless, taxation *is* bounded in its exercise by its own nature, essential characteristics and purpose. It must, therefore, visit all alike in a reasonably practicable way of which the Legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people in districts and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is a confiscation; not taxation, extortion; not assessment, and falls within the clearly implied restriction in the Bill of Rights."

In *People* vs. *Mayor of Brooklyn* (6 Barb. 214), the Court says: "Untrammeled by authorities, a safe and sound rule may be deduced from a few simple and well-settled principles. *In the first place, it may be assumed as a fundamental principle in our Government and laws, that individuals are protected in the enjoyment of their property,*

except so far as it may be taken in two ways, viz: as a public tax, upon principles of just equality, or for public use, with a just compensation, ascertained according to the provisions of the Constitution. Secondly, as money is property, every tax or assessment is taking property in some mode, and to be legal, must refer to one of the modes above mentioned. Taxes are defined to be 'burdens or charges imposed upon persons or property to raise money for a public purpose.' The right to impose a tax is inherent in every Government. * * * We are not, however to understand that the Legislature is omnipotent on this subject, *Its powers are limited and controlled by certain principles which lie at the very foundation of free Government.* Among these is the principle of just equality. * * * This is the only sense in which a tax is public. The Legislature has not the constitutional authority to exact from a single citizen, or a single town, or county or city, the means of defraying the entire expenses of the State. For, if this could be done, the constitutional prohibition would be evaded in all cases, and the Legislature could take private property for public use, without compensation, to any extent, *under the vague and indefinite pretense of taxation.*" Again, at page 216, the Court says: "The true rule deducible from sound reasoning, as well as the authorities, is this: *Legitimate taxation is limited to the imposing of burdens or charges for a public purpose, equally upon the persons or property within a district known and recognized by law.*" The case above referred to is cited approvingly in *People* vs. *Lynch* (51 Cal. 20).

Judge CHRISTIANCY (*Woodbridge* vs. *The City of Detroit*, 8 Mich. 306), referring to the constitutional provisions that private property should not be taken for public use without just compensation, says: "It is true these provisions do not refer to a taking of property in

payment of a tax or burden imposed under the taxing power, nor in payment of a debt or other duty to the public. It is doubtless true, also, that these prohibitions are primarily aimed against a direct taking of property, to be used in kind by the public, though the language itself makes no such distinction ; and the reason why it is properly so construed is, because all the recognized modes of indirect taking, include the idea of compensation. This is the only reason for the construction. The maxim, therefore, applies to these prohibitions in its full force, that, what cannot be done directly, shall not be done indirectly. *And when indirect means are employed to accomplish what is forbidden to be done directly, the law rejects these indirect means as of no validity, and treats the case as if the same end were obtained by direct means.* If this were not so, the whole effect of the prohibition might in all cases be evaded with impunity by the simple device of making the process consist of two steps instead of one. And while the Legislature could not authorize the taking of A's land for a public park, they might, under the specious name of tax or assessment, raise by the sale of A's land the whole sum necessary to pay B for his land, to be taken for that purpose ; * * and though they cannot take and use your property directly, they may sell it and use the money to purchase other property of the same or any other description."

" It is true that liability to abuse is not always of itself strong evidence of the non-existence of a power since all legislation and all *human* power is liable to abuse. But the fact that a proposed rule of construction would remove all constitutional restraint is a very strong evidence that the rule is erroneous." Id. p. 307.

In *Wilkinson* vs. *Leland* (2 Peters, 627), Mr. Justice Story held this language : *" The Fundamental maxims of free government seem to require that the rights of personal liberty and private property should be held sacred."*

In Vermont and in North Carolina it has been held that "altogether aside from any express provision of the Constitution, a statute taxing property without necessity of a public character, or without compensation in some form, would doubtless be regarded as entirely without the just limits of legislative power." (*Hatch* vs. *Vermont R. R. Co.*, 25 Vermont, 49; *Railroad Co.* vs. *Davis*, 2 Dev. and Bat., 451.)

In New York, prior to the adoption of the Constitution of 1821, there was no provision in the Constitution of that State providing that private property should not be taken for public use without just compensation, but in a case decided by the Court of Errors (*Rogers* vs. *Bradshaw*, 20 J. R., 735), before the adoption of the Constitution of 1821, where the Canal Commissioners had been authorized to take land, but no provision had been made for compensation, it was said, "this equitable and Constitutional right to compensation undoubtedly imposes it as an absolute duty on the Legislature to make provision for compensation whenever they authorize an interference with private right." (See also *People* vs. *Platt*, 17 J. R., 195; Bronson's Opinion in *Taylor* vs. *Porter*, 4 Hill, 140; and *Powers* vs. *Bergen*, 2 Seld, 358.)

In *Goshen* vs. *Stonington* (4 Conn. 209), Hosmer, J. held that *if there should exist a case of direct infraction of vested rights too palpable to be questioned and too unjust to admit of vindication, he could not avoid considering it a violation of the social compact and within the control of the Judiciary, although the Constitution had imposed no explicit*

restraint. He asks, "If a law were made without any cause to deprive a person of his property, or to subject him to imprisonment, who would not question its legality or who would carry it into effect?"

There is no express provision of the Constitution which forbids the taking of private property for private uses; but can it be so taken? Would a constitutional provision to that effect be upheld? We answer unequivocally both questions in the negative, and why? Because such a provision would violate the fundamental principles of free Government as declared in the Bill of Rights, and which lie at the foundation of the social compact.

Our Constitution has expressly recognized the existence of certain inalienable rights, resting upon sanctions more sacred than constitutional guarantees.

These rights are referred to in Secs. 1, 14, 21 and 23 of Article I of the State Constitution, in terms as follows:

SECTION 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.

SEC. 14. Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into Court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into Court for the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a Court of record, as shall be prescribed by law.

SEC. 21. No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.

SEC. 23. This enumeration of rights shall not be construed to impair or deny others retained by the people.

The Constitution recognized the inviolability of private property, and wisely so, since few interests take a deeper hold on man than those which relate to property; much of the general prosperity and much of the unexampled activity, energy and enterprise which distinguish the present era, is due to the all-prevailing conviction that private property is secure. (Dillon, C. J., in *Hanson* vs. *Vernon*, 27 Iowa, 42.)

These rights, which are beyond the reach of government and of the people, are strongly and aptly stated in Sections 2 and 3 of the Bill of Rights in the Kentucky Constitutions of 1799 and 1850.

SEC. 2. That absolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a Republic—not even in the largest majority.

SEC. 3. The right of property is before and higher than any constitutional sanction.

Taxes are in effect, as Mr. Mill contends—sacrifices made for the public good, equality of sacrifice being the rule. (2 Pol. Econ. 370, 372.) "Taxation cannot be arbitrary, because its very definition includes apportionment." (Cooley Const. Lim., p. 175.)

In *People* vs. *Lynch* (51 Cal. 20), a leading case, Justice McKinstry, speaking for the Court, says: "An assessment for a local improvement is a *tax* differing from other taxes, in that it need not be levied upon the *ad valorem* principle. Although such assessment is not prohibited by that clause of the State Constitution which provides that 'all property shall be taxed in proportion to its value,' it is of the very essence of taxation, *in every form*, that it be levied with equality and uniformity, and to this end there should be some system of apportionment." (*Taylor* vs. *Palmer*, 31 Cal. 241.) * * * "Whatever the basis of taxation, the requirement is that it shall be uniform. * * * The terms 'tax' and 'assessment' * * * both include the idea of some ratio or rule of apportionment, so that, of the whole sum to be raised, the part paid by one piece of property shall have the same known relation to or be effected by that paid by another."

The Kentucky Constitution of 1799 granted to the Legislature the taxing power, without limitation, other than the limitation under our form of government, inherent in the power itself. In other words, the people of the State of Kentucky conferred upon the Legislature every power of taxation which the people themselves might exercise in their original capacity. The grant was of all legislative power, without limitation, save such limitations as existed independent of constitutional sanction. More than a quarter of a century ago the Court of Appeals of that State, then composed of three of its most eminent jurists, Hon. George Robertson, Hon. Ephriam M. Ewing, and Hon. Thomas A. Marshall, was called upon to define this power, and of the results reached in their deliberations, Judge Cooley—Cooley on Taxation, 177—says: "The principles by which the legislative

apportionment of taxes is to be tested have been so admirably stated, that we prefer quoting the language of the Court, in preference to any attempt at stating them in our own language." A just tribute from a great jurist to the judgment of a learned Court.

The case referred to was *Lexington* vs. *McQuillan's Heirs*, 9 Dana, 513–516.

The Court says (Judge ROBERTSON, one of the first and most accomplished lawyers of the day, delivering the opinion of the Court):

"When shall a tax be levied? To what amount? Shall it be a capitation or property tax? Direct or indirect? *Ad valorem* or specific? And what classes of property are the fittest subjects of taxation? Are all questions wisely confided by our Constitution to the discretion of the legislative departments, subject to no other limitation than that of the moral influence of public virtue or responsibility to public opinion. But in some other respects, and so far as the power of taxation may be effectual being thus limited, it is in our opinion limited by some of the declared ends and principles of the fundamental laws. Among these political ends and principles, equality, as far as practicable, and security of property against irresponsible power, are eminently conspicuous in our State Constitution. An exact equalization of the burdens of taxation is unattainable and Utopian, but still there are well-defined limits within which the practical equality of the Constitution may be preserved, and which, therefore, should be deemed impassible barriers to legislative power. Taxation may not be universal, but it must be general and uniform; hence, if a capitation tax be laid, none of the class of persons thus taxed can be constitutionally exempt upon any other ground than that of public service; and if a tax be laid on land, no land within the limits of the State can be constitutionally exempted, unless the owner

be entitled to such immunity on the ground of public service. The Legislature in the plentitude of the taxing power, CANNOT have constitutional authority to exact from one citizen, or even from one county, the entire revenue for the whole commonwealth. Such an exaction, by whatever name the Legislature might choose to call it, would not be a tax, but would be undoubtedly the taking of private property for public use, and which could not be done constitutionally without the consent of the owner or owners, or without retribution of the value in money.

The distinction between constitutional taxation and the taking of private property for public use by legislative will, may not be definable with perfect precision, but we are clearly of the opinion that whenever the property of a citizen shall be taken from him by the sovereign will, and appropriated without his consent to the benefit of the public, the exaction should not be considered as a tax, unless similar contributions be made by that public itself, or shall be exacted rather by the same public will, from such constituent member of the same community generally as own the same kind of property.

Taxation and representation go together, and representative responsibility is one of the chief conservative principles in our form of Government. When taxes are levied, therefore, they must be imposed on the public in whose name and for whose benefit they are required, and to whom those who impose them are responsible. And although there may be a discrimination in the subjects of taxation, still persons in the same class, and property of the same kind, must generally be subjected alike to the same common burden. This alone is taxation, according to our notion of constitutional taxation in Kentucky. And this idea fortified by the spirit of our Constitution, is, in our judgment, confirmed by so much of the twelfth section of the tenth article as declares : "*nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.*"

This decision has stood the test of time, and has met the approval of the most enlightened commentators upon our governmental system.

Mr. Justice McKEE, in *Milligan* vs. *Smith*, 59 Cal., 206, fully sustains the position we have assumed: That the right of property is before and higher than any constitutional sanction, and that arbitrary power over it exists nowhere in a republic.

The principles enunciated are but the echoes of the Declaration of Independence, proclaiming the equality of all before the law, and the existence of inalienable rights, "to secure (not to create) which governments are instituted among men." Principles placed beyond the attacks of the States by the declaration of the Fourteenth Amendment of the Federal Constitution, "nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" principles which constitute the corner-stone of a free government, and from which it cannot depart without making rebellion to its laws a freeman's right, and revolution a people's duty.

"All property shall be taxed in proportion to its value;" upon this law hangs the law and gospel of taxation.

"All property shall be taxed in proportion to its value" how simple the rule! how easy its application! how just and beneficent its operation!

"All property shall be taxed in proportion to its value;" this line marks the limit of the power which

rests in the people, or which can be delegated to any government within the boundaries of the Republic; within that limit are peace, order, security, and all just governmental powers; without are turmoil, confusion, spoliation and anarchy.

"All property shall be taxed in proportion to its value;" to this test must come every revenue law whether such law rests alone upon legislative action or sounds in constitutional enactment. If it fail to meet this test, reason, principle and authority, the trinity of the law unite in the judgment that it is not the exercise of the lawful power of taxation, but that is the exercise of the unlawful power of confiscation.

If every person in the land should agree that contributions might be exacted from property for the support of the government by any other rule than that of equality and uniformity—if by unanimous consent the power to impose such burdens unequally was attempted to be conferred upon government, such rule could not be lawfully enforced, nor such power lawfully exercised. The rule and the power would invade the domain of the inalienable rights. No one can surrender that which is not his own. The inalienable rights which exist independently of constitutional sanctions are not the property of this generation. They are the heritage of peoples yet to be, and we are but the trustees of that heritage clothed with the limited right of present use and enjoyment, and charged with its defense and maintenance to the end that we may transmit it unimpaired to the rightful heirs.

The power of taxation is the only power which the

plaintiffs do, or can invoke to sustain these actions. But we have seen that there is a limitation inherent in the power to tax, namely, that when taxes are levied upon property they must be apportioned with reference to a uniform standard—must be laid by some rule of equality and uniformity—otherwise they would degenerate into mere arbitrary exactions; and such an exaction by whatever name the Legislature might choose to call it would not be a tax, but would undoubtedly be the taking of private property for public use without just compensation. This limitation finds a resting place in the fundamental principles which underlie our republican form of government, and, therefore, cannot be lawfully removed either by the Government or by the People. "The right of property is before and higher than any constitutional sanction," and "arbitrary power over it exist nowhere in a republic."

It may be claimed that the right to discriminate is found in the reserved power to alter, amend, or repeal the laws under which corporations are formed, and this brings us to the consideration.

The Control of the State over Corporations formed under a General Law where a Reserved Power of Amendment is Embodied in the Law or Imposed by the Constitution.

In the Dartmouth College case it was held that the charter constituted a contract between the sovereign and the corporation. The charter in question was a royal charter and the rights under it rested in the grant. At

and before the time the decision in that case was made, the various State Legislatures of the Union had been creating corporations by special legislative acts. These acts constituted the charters of the corporations so created and, like the royal grants, were properly construed as contracts between the State and the corporations. After the decision in that case was promulgated the various States, acting upon the hint given by Judge Story, began to insert in the charters thereafter granted a reservation of the right to alter or repeal. These reservations being part of the contract, were held to take the contract out of the rule laid down by the Court in the Dartmouth College case, and to permit one party to that contract, to wit: the State, to change its terms notwithstanding the inhibition of the Federal Constitution against impairing the obligations of contracts. In the course of time it was felt that the power to create corporations by special acts which conferred upon the corporators special privileges not enjoyed by the community in general, tended to evil results; and to prevent such results provisions began to find their way into State Constitutions, which not only forbade the creation of private corporations by special acts, but which did in effect prohibit entirely the creation of private corporations by special acts, but which did in effect prohibit entirely the creation of private corporations by the Legislature. The provision in the California Constitution of 1850 is a fair type of the provisions in question. It is Article IV, Section 31:

"Corporations may be formed under general laws, but shall not be created by special Acts, except for municipal purposes." Corporations are not to be created by legislative acts, but general laws must be passed under which persons may voluntarily associate themselves together. General laws do not sound in contract. General laws may, without any reservation, be altered or repealed at the will of the law-making power, and a reservation in a general law that it might be altered and repealed would and could have no significance whatever. No person, as we shall hereafter show, has a vested right in general laws, and therefore the repeal could never impair the obligation of contracts, or invade the domain of Govermental power reserved to the people or prohibited to the States. A general law authorizing persons to associate themselves for business purposes is simply a municipal regulation. The persons acting under its authority would have no more legal right to complain of its repeal than would a public officer exercising functions under a statute have the right to complain of the repeal of that statute. The reservation of the right to alter or amend would find an appropriate place in a royal grant of privileges, it would have an office to perform in a legislative charter, but has neither office to perform nor place in a general law. The reservation in the Constitution of California, in the connection in which it is used, is but a blunder.

The effect of a repeal of a general law upon rights acquired under the law is familiar to all, and the rules governing are elementary, so that even allusion to them

here would be out of place. The right to alter, amend or repeal a general law, is not a novel one. It has universally been exercised from the foundation of the Government. No American law-giver ever claimed for his work the sanction of divinity, or exacted from his countrymen a pledge that it should not be repealed. The power to repeal a general law is one thing, but the power to disturb vested rights is another and a very different thing. To disturb vested rights is a power denied by the Constitution of every State in the Union, as well as the Federal Constitution, and moreover, as we shall hereafter see, it is a power which can never be exercised until the great fundamental principles which underlie our form of government shall have been numbered among the things that have been.

To give to this reservation all the force claimed for it, it is after all but a reservation of legislative power. To reserve is to keep back, to withhold. As the Legislature never had the right to impair the obligation of contracts, or to confiscate property, it therefore could not in the nature of things reserve any such power. The law-making power, whether exercised by the people in their original capacity or by a legislative assembly to whom it has been delegated, does not rest in a contract between the law-making power and the person whom the legislation is to affect. The law-making power of the States of the Union is limited by the provisions of the Federal Constitution and by the fundamental principles of our Government; and neither a natural nor artificial person can confer upon the State or the people of the State the

right to do a thing which either the Federal Constitution or the fundamental principles of government forbid. It was held in the Mobile case (*Pollard's Lessees* vs. *Hagan*, 3 Howard, p. 223), that the sovereign State of Alabama could not by treaty with the Federal Government enlarge the powers of that government even as to the State of Alabama itself, and the principle of that case has still more telling force when an attempt is made to maintain the doctrine that a citizen of the State, by a contract with the Legislature can barter away his inalienable rights and by contract confer upon the Legislature of a State an authority the exercise of which is prohibited to that Legislature by the Constitution. Can I lawfully agree with the Legislature of this State that if it grants to me an acre of submerged land, I will surrender my right to trial by jury? No one would dare to answer this question in the affirmative. I cannot give to a private individual the right to take my life, nor exempt him from the penalties which the law denounces against him if, at my own request, he deliberately takes my life. I may lawfully surrender property which I own, may give it away, but I cannot surrender the right to acquire, possess and enjoy property. This right exists for the benefit of society and the exigencies of society require that it should be sacred.

The examination which we have already made of the nature of these so-called corporations shows conclusively that the only right which they acquire from the State under the general law, is the right to be a corporation. It would seem to be self-evident that the only thing which

the State could take away would be the right which it had conferred, and as that right, in this class of corporations, is conferred by general law in which no one has a vested right, the corporation could not be heard to complain. The man who to-day erects buildings and puts in them machinery for the manufacture of some article of common consumption, on the importation of which the law imposes a tariff duty, which is practically prohibitory, may expect that this will continue in force, and that he will in consequence reap large profits, but he has no vested right in the general law which imposes the tariff, no vested right which could entitle him to insist that the law shall remain unchanged for his benefit. If the duty should be removed and his property rendered worthless in consequence, he is nevertheless deprived of no right. "All statutory privileges," says Mr. Cooley, "depend upon this principle, and they may be taken away by changes in the general laws at any time." (Principles of Constitutional Law, p. 320.)

So the persons who formed the corporation party to this suit may have been impelled to do so by reason of the general laws of the State of California. They have no vested right in those general laws, and the Legislature may at any time take the life of the legal entities which hold the legal title to the property of which they are the beneficial owners. The Legislature may kill the trustee, but the rights of the beneficiary to the property will remain intact. The property, as in the case above put, may not after such legislative action be so productive. It may not be so easily and profitably held

and managed, but nevertheless it remains intact, and the right of the beneficiary to it as complete as though there had never been a corporation in existence.

Judicial Construction of the Power to Alter, Amend or Repeal.

All authorities agree that this power is not unlimited, that sheer oppression and wrong cannot be inflicted under the guise of an amendment or alteration.

Shields vs. *Ohio*, 95 U. S., 324.
Sinking Fund Cases, 99 U. S., 721.
New Jersey vs. *Yard*, 95 U. S., 104.
Miller vs. *New York & Erie Railroad Company*, 21 Barber, 518.

In *Peik* vs. *Chicago Railway Company*, 94 U. S., 175, the question of the power of the Legislature of Wisconsin to provide by law for the maximum charge to be made by the Chicago and Northwestern Railway for fare and freight upon the transportation of persons and property carried within the State, was presented. In the course of his opinion in that case, Chief Justice Waite observes:

"The company was chartered under a special act of the Legislature. The Constitution of the State in force when the act of incorporation was passed provided that all acts for the creation of corporations within the State, may be altered or repealed by the Legislature at any time after their passage." The learned Chief Justice continues: "It was conceded upon the argument that this reserved power of the Constitution gave the Legislature the same power over the business and property of corporations that it has over individ-

uals;" or as it is expressed by one of the counsel, nothing more could have been intended than to leave the stockholders in corporations in such a position that the Legislature could place them on the same footing with natural persons, before the law, and disable them from permanently evading the burdens on all others engaged in similar vocations, by appealing to the letter of their charter. Their object was not to open the doors to oppression, but to secure simple equality between citizens of the State, whether working singly or in corporate associations." "Without stopping to inquire," continues the learned Chief Justice, "whether this is the extent of the operation of this important constitutional reservation, it is sufficient to say that it does, without doubt, have that effect."

In *Chicago, Burlington and Quincy Railroad Company* vs. *Iowa*, 94 U. S., 155, the Chief Justice, in delivering the opinion, expressed substantially the views of counsel in the Peik case, and said, speaking of the same railway company:

"This company, in the transaction of its business, has the same rights, and is subject to the same control as private individuals under the same circumstances."

Partnerships in the State of California are formed and exist under general laws, which regulate the rights and liabilities of the parties, the manner and mode of conducting the business of the partnership. These laws are found in the Civil Code of California. The right to alter, amend or repeal them is as undoubted as though it had been expressly reserved in the Constitution or the laws themselves. The next Legislature which assembles may repeal every law in relation to partnerships, and may, unless there is a right of association coming from

a source higher than the Constitution, prohibit the formation of partnerships, the use of firm names or the transaction of business by associations of men. While it may be conceded that the Legislature can do all of these things, yet no one would claim that they could take from the partners the property which they had already acquired. If the right to take the property of the persons composing the so-called corporations of California lurks in the reservation to alter, amend or repeal the corporation laws, the same right to destroy partnerships and to confiscate the property of the partners may be found in the acknowledged right to alter, amend or repeal the municipal regulations relating to partnerships.

Mr. Justice Story, in the case of *Allen* vs. *McKeen*, 1 Sumner, 176, held that under a reservation "to alter, restrain or extend," the State could not "meddle with the property of the corporation or extinguish its corporate existence."

In *Sage* vs. *Dillard*, 15 B. Monroe 340, the Supreme Court of Kentucky held "that the Legislature might, by virtue of a reservation in a statute similar to the reservation in the Constitution of the State of California, repeal or destroy, but that the power merely to repeal or destroy did not imply a right to cripple or to maim."

In *Miller* vs. *The New York and Erie Railroad Co.*, 21 Barb. 513, it was held that the power to alter, modify, or repeal charters did not authorize a Legislature to compel a railroad company to cause a new highway to be taken

across their line at their own cost, there being no provision touching new highways in their charter. It was further held in the same case that a law imposing such a new obligation on the railroad, passed subsequent to its incorporation, was the taking of private property without compensation.

In *The Commonwealth* vs. *Essex Co.*, 13 Gray, 239, Mr. Chief Justice Shaw, delivering the opinion, suggested the following as a rule of limitation of legislative power, to amend or alter: "That where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under the legitimate exercise of the powers granted."

In *Durfee* vs. *Old Colony and Fall River R. R. Co.*, 5 Allen, 230, the Court refrained from the expression of any opinion on the limits of legislative power to alter or amend, but the case was fully argued upon this proposition and the limitation of the exercise of this power was thus broadly and tersely laid down by counsel.

"The limit to this power will be found when any attempt is made to abrogate any contract made by the corporation under their charter or deprive them of any vested property or rights of property legally acquired."

Chief Justice Bigelow, who delivered the opinion of the Court in *Durfee* vs. *Old Colony and Fall River R. R. Co.*, at its conclusion observes: (5 Allen, 247.) "It may be well to add, in order to avoid misapprehension, that we do not intend to say that the Legislature have any

power to change or modify an act of incorporation in such a way as to affect in a material particular a contract which they have entered into with a third person. Such an exercise of legislative power would be unconstitutional and invalid, because it would impair the obligation of a contract."

The Massachusetts cases cited are the most instructive cases to which my attention has been called. The high legal standing of the Judges who participated in those decisions, and the appreciation in which the Supreme Judicial Court of Massachusetts is universally held, give controlling force to those authorities.

In *Territt* vs. *Taylor*, 9 Cranch, 43, Mr. Justice Story, who delivered the judgment of the Court, held that the church property in Virginia was not public property, but the property of the several parishes; and did not become the property of the State by the Revolution, and the disestablishment of the church. Upon this topic he says:

"Had the property thus acquired been originally granted by the State or the king there might have been some color (and it would have been but a color) for such an extraordinary pretension, but the property was in fact and in law generally purchased by the parishioners or acquired by the benefactions of pious donors; the title thereto was indefeasibly vested in the churches, or rather in their legal agents. It was not in the power of the Crown to seize or assume it, nor of Parliament itself to destroy the grants unless by the exercise of a power the most arbitrary, oppressive and unjust, and endured only because it could not be resisted."

The learned editor of the *American Law Review* (Vol. 1, No. 3, April, 1867) collates the authorities bearing upon the legislative control over corporations under reservations in special charters, and after an elaborate, but

as to the corporations an unfriendly review of the same, stated his conclusions substantially as follows :

"From the multitude of decisions which have now been reviewed, certain principles can be deduced as fully incorporated into the body of settled American law. 1. Where an absolute power to alter, amend or repeal acts of incorporation have been reserved to the Legislature, the power of repeal is unqualified. 2. It is immaterial whether the reserved power was specially set forth in the particular charter of the corporation, or was at the time the grant was made part of the general statute law of the State. 3. That all reservations in grants to corporations are to be construed in favor of the State. 4. That the Legislature is the sole judge within certain limits of the justice or propriety of alterations and amendments to charters. 5. The Legislature can make no alteration or amendment to any charter, under its reserved power therefor, which shall impair the obligation of any contract legally entered into by the corporation ; and 6. Neither can the Legislature make any alteration or amendment by which a corporation is deprived without compensation of its own vested property or rights."

The foregoing is a statement of principles to be deduced from the decisions upon the subject in hand, made by one who was endeavoring to give to the reservation in question the most liberal construction. It may be said here, in answer to the fears which have been expressed that the vast properties in the ownership of transportation companies might be used to endanger the safety of the people, that if the time ever comes when it shall appear that these fears are well founded, and that it is right and proper for the government to assume control of these properties, ample government power to that end exists in the power to take private property to subserve the public uses. Under the exercise of this

power the whole of this property could be transferred from the individual to the government, and the safety of the government on the one hand be assured, while the interests of the individual on the other would be fully protected by the compensation which the government would make.

Another View of the Reservation to Alter, Amend and Repeal Found in the State Constitution of California.

The provisions of the Constitution of California of 1850, Art. IV, Sec. 31, are that corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered, from time to time, or repealed. It will be observed that these provisions differ materially in their effect from provisions of like character in a special charter. Under the Constitution of 1850 a private corporation cannot be created; it must be formed under general laws, and the reservation is not that the act by which a special corporation is formed may be altered, amended or repealed, but that the general laws under which the corporation is formed may be altered, from time to time, or repealed.

Sec. 31, Art. IV, of the old Constitution is found in that portion of the instrument which limits the legislative power; and if it be true, as contended on the other side, that a general law, under which a corporation is formed, constitutes the charter of that corporation, and rests in contract, it must also be true that the constitutional pro-

vision in question becomes part of the contract between the corporation and the State—the corporation, on the one hand, agreeing that the privileges conferred may be modified or taken away, and the State, on the other, agreeing that such modification shall only be made for such privileges taken away by general law. And it must be further held, in this view of the case, that the "Bill of Rights" enters into, and becomes a part of, that contract, and that all general laws passed must be in subordination to the provision of that "Bill of Rights." The Southern Pacific Railroad, as it appears from the pleadings, was formed under the Railroad Act of 1861. The term of its existence was fixed for the period of fifty years. It is, therefore, one of the corporations entitled to protection against special legislation, whether that legislation be in the shape of a statutory enactment or a constitutional ordinance. A change of the Constitution cannot release the State from contracts made under a Constitution which permitted them to be made. The inquiry is: Was the contract permitted by the then existing Constitution? If so, the sovereignty which ratified it is the same sovereignty which made the Constitution of 1879, neither having more power than the other to impair a contract made by a State Legislature with individuals. (*Dodge* vs. *Wolsey*, 18 Howard, 360.)

The limitation of the power to alter, amend or repeal has been defined by the Supreme Court of the State of California.

The reservation which we have been discussing applies to legislation creating municipal as well as

private corporations. It never has been doubted that the control of the State over the affairs of municipal corporations is more absolute than its control over the affairs of private corporations. It has been maintained in some quarters that the State has the right to create and enforce an obligation against a municipal corporation of its own creation; that it has the right to appropriate the money and property of such a corporation. But in this State it has been expressly held that this power, even as to a municipal corporation, does not exist, and that the Legislature cannot without the consent of a municipal corporation, create and enforce a claim against it. (*Hoagland* vs. *The City of Sacramento*, 52 Cal., 151.)

And it has been further held in this State, that the Legislature cannot levy a tax or assessment for a municipal purpose without the consent of the municipality. *People* vs. *Lynch*, 51 Cal., 15. The California cases, above cited, settle the question in controversy here, for they clearly hold that the property, even of a municipal corporation, cannot be taken, except by due process of law, notwithstanding the reserved power in question.

Mr. Justice Story, in the Dartmouth College case considering this topic, says: "It may also be admitted that corporations for mere public government, such as towns, cities and counties, may in many respects be subject to legislative control. But it will hardly be contended, that even in respect to such corporations, the legislative power is so transcendant, that it may, at its will, take away the private property of the corporation, or change the uses of its private funds acquired under the public faith."

In Conclusion Upon this Point.

Rights are being attempted to be wrested from the defendant by a summary proceeding unknown to the laws of the land. Our language might be searched in vain for more appropriate words to close defendant's appeal to this Court than those uttered by Judge Coulter in Ervine's Appeal (16 Penn. St., 268):

"But these parties stand here under that irremovable decree of the Constitution, that for any injury done an individual in his lands or goods, he shall have remedy by due course of law, in the Commonwealth's Court, where right and justice shall be administered. This Court have so determined in *Brown* vs. *Hummel*, 6 Barr. In closing this opinion I may say, that when, in the exercise of proper legislative powers, general laws are enacted which bear or may bear on the whole community, if they are unjust and against the spirit of the Constitution, the whole community will be interested to procure their repeal by a voice potential. And that is the great security for just and fair legislation.

"But when individuals are selected from the mass, and laws are enacted affecting their property, without summons or notice at the instigation of an interested party, who is to stand up for them, thus isolated from the mass in injury and injustice, or where are they to seek relief from such acts of despotic power? They have no refuge but in the Courts, the only secure place for determining conflicting rights by due course of law. But if the judiciary give way, and, in the language of the Chief Justice in *Greenough* vs. *Greenough*, 1 Jones, confesses itself 'too weak to stand against the antagonism of the legislature and the bar,' one independent, co-ordinate branch of the Government will become the subservant handmaid of another, and a quiet, insidious revolution will be effected in the administration of the Government, whilst its form on paper remains the same."

POINT III.

The Assessment Upon Which the Action is Based is Void Because it Includes Property Which the State Board of Equalization had no Jurisdiction Under any Circumstances to Assess. The Part Legally Assessed is so Blended with the Balance that it Cannot be Separated and the Entire Assessment Must Fall.

Section ten of Article 13 of the Constitution of California from which the Board of Equalization derives its authority reads as follows:

Section 10. "All property except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township or district in which it is situated in the manner prescribed by law. The franchise, roadway, road-bed, rails and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts."

"On the 15th day of August, 1885, the State Board of Equalization made the assessment which is the basis of this suit. It made that assessment upon the franchise, roadway, road-bed, rails, rolling-stock *and property* of said railroad. It was not made separately upon the franchise, roadway, road-bed, rails and rolling-stock, or upon any of the properties of the railroad company, but all of the properties were blended. It included all property and kinds of property mentioned in Section 3665 of the Political Code of California, as amended March 9th, 1883, except depots, stations, shops and buildings, erected upon the space covered by the right of way, which last mentioned property was assessed as provided in said section by local assessors, and except steamboats."

(Finding 21, record folio 110 and 111.)

The section in question provides, that the Board must assess the franchise, roadway, road-bed, rails and rolling-stock of all railroads operated in more than one county, that the assessment must be made to the corporation, person or association of persons, owning the same, and must be made upon the *entire railway* within the State and must include the right of way, bridges, culverts, *wharves and moles*, upon which the track is laid, and *all steamers* which are engaged in transporting passengers, freights, and passenger and freight cars across the waters which divide the road. The depots, stations, shops and buildings, erected upon the space covered by the right of way are assessed by the assessor of the county wherein they are situated.

We have now seen that the assessment in question did include all of the property mentioned in this section, except depots, stations, shops and buildings erected upon the space covered by the right of way and except steamboats.

It therefore included the entire railway within the State, and it included wharves and moles, upon which the track is laid. The theory of the State Board of Equalization seems always to have been that it had jurisdiction over all railroad property, except depots, stations, shops and buildings erected upon the space covered by the right of way. Mr. Delmas, who had virtually been the advisor of the State Board of Equalization for many years, said in his argument in the Santa Clara case, 118 U. S., page 397 :

"Fences built upon the line of the roadway are a part of the roadway, as necessary to its protection, as much so as the railing of a bridge is a part of the bridge, or the frame-work of a tunnel is part of the tunnel. Such has always been the understanding of the law in California, and the fences have always been assessed by the Board of Equalization.

"I have never been able to grasp the proposition that fences are no part of the railroad which they inclose. If the defendant made a conveyance of 'its railroad from San Francisco to San Jose' would not the fences pass by the deed? Clearly as much so as a sale of my garden would convey the fence which incloses the garden."

Now it is true that the steamers "Transit" and "Thoroughfare" with iron tracks laid upon their decks, and used for transporting freight cars across the Bay of San Francisco, from the rails on the East to the rails on the West side of that bay are part of the Central Pacific Railroad. It is true that fences if they do not belong to coterminous owners, are part of the Railroad. It is also true that depots, stations, shops and buildings, erected for the railroad purposes upon the space covered by the right of way are part of the railroad. All these things would pass by grant of the railroad. But the framers of the Constitution, for the purposes of taxation, separated railroad property, and gave to the State Board jurisdiction over the franchise, roadway, roadbed, rails, and rolling-stock of all railroads operated in more than one county, and this jurisdiction was given by enumerating the things themselves. All other property belonging to the railroad company, whether part of its railroad or not, was left within the jurisdiction of the local authorities. It was this division of

railroad property and the vesting of jurisdiction in two tribunals to tax it, which has made the tax so onerous. The State Board of Equalization acting in conformity with the advice and belief of Mr. Delmas, included in its assessments, everything except depots, stations, shops and buildings erected upon the right of way. Local assessors assessed in their respective counties all those parts of the railroad which were not included within the Constitutional jurisdiction of the State Board of Equalization. In the cases argued with this, Numbers 660, 661, 662 and 663, the State Board includes *wharves and moles and steamboats*, but prior to the assessment complained of in this case, the Supreme Court of the State of California, had held that the steamers "Transit" and "Thoroughfare," which were as much part of the defendant's road as its roadway or road-bed were subject to assessment by the local assessors, and that the tax based upon such assessments was valid and compelled the company to pay it.

San Francisco vs. *C. P. R. R. Co.*, 63 Cal., 467.
Santa Clara Co. vs. *S. P. R. R, Co.*, 118 U. S., 413.

After this decision the State Board excepted, as appears from the findings in this case, steamers, but still included the wharves and moles, which were the subjects of assessment by the local assessors under the general laws.

There is no doubt, but under the decision of this Court and of the highest Court of California that Section 3665 is unconstitutional, and that an assessment made in

accordance with its provisions, must be null and void.

The Board in this case, according to the findings, assessed the franchise, the road-bed, the roadway, rails, and rolling-stock. When it had assessed that property its power was exhausted, but it proceeded further and assessed the wharves and the moles, and blended their valuations with the valuations which they had fixed upon other property.

A wharf is defined by Webster to be a perpendicular bank, or mound of timber or stone and earth, raised on the shore of a harbor, river, canal, or lake, or extending some distance into the water, for the convenience of lading or unlading ships or other vessels.

A mole is defined by Webster as a mound or massive work, formed of large stones laid in the sea, extended in a right line or an arc of a circle before a port, which it serves to defend from the violence of the waves thus protecting ships in a harbor.

Now it is true, that a railroad may be and frequently in these days is laid upon a mole, or for the convenience of lading and unlading ships is laid upon a wharf. The rails, the road-beds, and the roadway, notwithstanding the fact that they are laid upon moles or wharves, might be the subject of assessment by the State Board of Equalization ; but these things are assessed when the assessment is made upon the road-bed, roadway and rails.

And when the State Board of Equalization assessed the enumerated property it had reached the end of its jurisdiction, and performed all the functions which the law

conferred upon it. Wharves and moles as such though belonging to a railroad company are subject to assessment by the local assessors alone. The State Board of Equalization has no more jurisdiction because they belong to a railroad company and are used in connection with the road, than it has over the shops, depots and steamers used as part of a road, or the fences built alongside of it.

The vice of this assessment and of every one made rests upon the assumption of Mr. Delmas, followed by the State Board of Equalization that because a thing would pass by grant, as part of a railroad, it was subject to the jurisdiction of the Board. So tenacious has the Board been upon that subject that notwithstanding the decision of the Supreme Court of the State of California, that steamers though part and parcel of a railroad were not the subject of assessment at their hands, notwithstanding this Court has decided, that though fences may be part of a railroad, yet they are not subject to the jurisdiction of the Board, the Board has yielded only to the letter of these decisions and has wantonly violated their spirit and disregarded the principle upon which they are founded.

The principle of the "Thoroughfare" and "Transit" case decided by the Supreme Court of California, controls here and would be binding upon this Court even though this Court were of a different opinion. No such difference however exists. Both high tribunals are in harmony and it would seem that the case at the bar and the other cases argued with it are to end whenever the record is looked into.

POINT IV.

The Law of the State of California under which the Proceedings in this Case were Instituted in the Superior Court, and the Law in Force which Prescribes the Mode and Manner of Collecting Taxes Assessed by the State Board of Equalization, are Special, and Violate the Provision of Subdivisions 3rd and 10th of Section 25 of Article 4, of the Constitution of the State of California.

Upon this point the decision of the Superior Court of the State of California is in our favor. The able opinion of the learned Judge who determined the case is given in *extenso* in the brief of Judge Harvey S. Brown, filed herein. That brief also contains an exhaustive argument upon this topic, and to it I beg to refer.

All of which is respectfully submitted,

CREED HAYMOND,
Counsel for Defendant in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1887.—No: 660.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff in Error,

VS.

THE CENTRAL PACIFIC RAILROAD COMPANY,

Defendant in Error.

Brief on Behalf of Defendant in Error.

HARVEY S. BROWN,

Counsel for Defendant in Error.

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BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Statement of Case.

This action was commenced on the 23d day of February 1884, in the Superior Court of the City and County of San Francisco, by the People of the State of California against the Central Pacific Railroad Company, to recover certain State and County taxes assessed by the State Board of Equalization on the 18th of August, 1883, against the defendant in error.

The case was removed to the Circuit Court of

the United States for the District of California. There judgment was rendered in favor of the defendant.

The case in this Court stands upon the pleadings and findings, and all of the questions involved are thereon raised.

The answer consists of specific denials of all the matters which go to the validity of the assessment and tax, and those denials would, under the practice in California, have been sufficient to raise every issue passed upon in the findings. (Record, Folios 13 to 17.) By separate answer substantially the same issues were raised. (Record, Folios 18 to 55.) Tender of $166,119.10 was pleaded. (Record, Folios 56 to 57.) This tender was accepted, and the money paid. (Record, Folios 14 to 147.)

Points.

THE ASSESSMENT IS VOID, BECAUSE IT INCLUDES PROPERTY WHICH, UNDER THE CONSTITUTION, THE STATE BOARD OF EQUALIZATION HAD NO RIGHT TO ASSESS.

Section 10 of Article XIII of the Constitution of the State of California reads as follows:

SECTION 10. "All property, except as herein-"after in this section provided, shall be assessed

"in the county, city, city and county, town, town-
"ship or district in which it is situated, in the
"manner prescribed by law. The franchise, road-
"way, road-bed, rails and rolling stock of all rail-
"roads operated in more than one county in this
"State shall be assessed by the State Board of
"Equalization at their actual value, and the same
"shall be apportioned to the counties, cities and
"counties, cities, towns, townships, and districts
"in which such railroads are located, in propor-
"tion to the number of miles of railway laid in such
"counties, cities and counties, cities, towns, town-
"ships and districts."

Section 3665 of the Political Code of California, as amended March 9th, 1883, so far as the same is material to the question, is as follows:

"366. The State Board of Equalization must
"meet at the State Capitol on the first Monday
"in August, and continue in open session from
"day to day, Sundays excepted, until the third
"Monday in August. At such meeting the
"Board must assess the franchise, roadway, road-
"bed, rails and rolling stock of all railroads oper-
"ated in more than one county. Assessment
"must be made to the corporation, person or asso-
"ciation of persons owning the same, and must be
"made upon the entire railway within the State,
"and must include the right of way, bridges, cul-
"verts, wharves and moles upon which the track
"is laid, and all steamers which are engaged in
"transporting passengers, freights, and passenger

"and freight cars across waters which divide the "road. The depots, stations, shops and buildings "erected upon the space covered by the right of "way are assessed by the Assessor of the County "wherein they are situate * * *."

The fifteenth finding of fact (Transcript, folios 138 and 139) reads as follows:

"XV.

"That on the 18th day of August, 1883, the "State Board of Equalization of the State of Cali-"fornia, pretending to act under and by virtue of "the powers conferred upon it by Sec. 10 of Arti-"cle XIII of the Constiution of the State of Cal-"ifornia, did make a pretended assessment for the "purposes of taxation for the fiscal year of said "State then next ensuing, upon the franchise, "roadway, roadbed, rails and rolling stock of said "railroad against defendant. Said pretended as-"sessment was not made separately upon the fran-"chise, roadway, roadbed, rails and rolling stock, "or any properties of said railroad, but all of said "property was blended together in making said "assessment, which assessment was then and "there so entered upon the minutes of said Board. "Said assessment is the assessment upon which "the several taxes mentioned in the complaint "herein are based, and no other assessment than "the aforesaid was ever made of said property or "any part thereof, for said fiscal year. Said assess-"ment included all property and kinds of property

" mentioned in Section 3665 of the Political Code
" of California, as amended March 9, 1883, except
" depots, stations, shops and buildings erected up-
" on the space covered by the right of way, which
" last mentioned property was assessed, as provid-
" ed in said section, by local assessors."

Reading this finding in connection with section 3665 of the Political Code, it appears that the State Board of Equalization, in making the assessment in question, followed the provisions of that section, and included within the assessment not only the property which it was authorized to include by the State Constitution, but property which the State Constitution provides shall be assessed by the local assessors; to wit, wharves and moles upon which tracks are laid, and steamers engaged in transporting freights and passengers.

Section 3665 is clearly unconstitutional, and the assessment made in accordance with it must fall. This is no longer an open question; the principle involved having been determined by both this Court and the highest Court of the State of California.

Santa Clara Co. vs. *Southern Pacific R. R. Co.*, 118 U. S., p. 394; *City and County of San Francisco* vs. *Central Pacific R. R. Co.*, 63 Cal. 467.

II.

THE STATUTES UNDER WHICH THE PROCEEDINGS IN THIS CASE WERE INSTITUTED IN THE COURT BELOW, AS WELL AS THE STATUTE IN FORCE WHICH PRESCRIBES THE MODE AND MANNER OF COLLECTING TAXES ASSESSED BY THE STATE BOARD OF EQUALIZATION, VIOLATE THE PROVISIONS OF THE STATE CONSTITUTION, AND ARE VOID.

The laws in question are found in sections 3666, 3667, 3668, 3669 and 3670 of the Political Code, as amended March 9th, 1883. They are as follows:

SEC. 3666. "The State Board of Equalization "must prepare each year a book to be called 'Rec- "ord of Assessment of Railways,' in which must "be entered each assessment made by the Board, "either in writing, or by both writing and print- "ing. Each assessment so entered must be signed "by the Chairman and Clerk. The record of the "apportionment of the assessments made by the "Board to the counties, and cities and counties, "must be made in a separate book, to be called "'Record of Apportionment of Railway Assess- "ments.' In such last described book must be "entered the names of the railways assessed by the "Board, the names of the corporation to which "or the name of the person or association to "whom each railway was assessed, the whole num- "ber of miles of the railway in the State, the num-

"ber of miles thereof in each county, or city and "county, the total assessment of the franchise, "roadway, roadbed, rails and rolling stock for pur- "poses of State taxation, the amount of the ap- "portionment of such total assessment to each "county, and city and county, for county and city "and county taxation. Before the third Monday "of October of each year the Clerk of the State "Board of Equalization must prepare and trans- "mit to the Controller of State duplicates of the "'Record of Assessment of Railways,' and 'Rec- "ord of Apportionment of Railway Assessments,' "each certified by the chairman and clerk of the "Board, and to be known respectively as 'Dupli- "cate Record of Assessment of Railways,' and "'Duplicate Record of Apportionment of Railway "Assessments.' In the last named duplicate two "columns must be added, in one of which the "Controller must enter the State taxes due the "State, upon the whole assessment, by each cor- "poration, person or association; and in the other "the county or city and county taxes due upon "the assessment apportioned to each county or "city and county by each corporation, person or "association. The two duplicates constitute the "warrant for the Controller to collect the state and "county and city and county taxes levied upon "such property assessed by the Board, and the "amount of the apportionment of the assessment "to each county, and city and county, respective- ly." (New section, approved March 9, 1883; Statutes and Amendments 1883, p. 65; went into effect immediately.)

SEC. 3667. "When the Board of Supervisors "of each county, and city and county, to which "the State Board of Equalization has apportioned "the assessment of railways, shall have fixed the "rate of county, or city and county taxation, the "clerk of the Board of Supervisors must forth- "with, by mail, postage paid, transmit to the Con- "troller a statement of the rate of taxation levied "by the Board of Supervisors for county, or city "and county taxation. If the clerk fails to trans- "mit such statement, the Controller must obtain "the information as to such rate of taxation from "other sources. On or before the fourth Monday "of October, the Controller must compute and en- "ter in separate money columns in the 'duplicate "record of apportionments of railway assessments' "the respective sums, in dollars and cents, reject- "ing fractions of a cent, to be paid by the corpo- "ration, person, or association liable therefor, as "the State tax upon the total amount of the assess- "ment, and the county, or city and county tax upon "the apportionment of the assessment to each "county, and city and county, of the property as- "sessed to such corporation, person, or associa- "tion named in said duplicate record." (New sec- tion, approved March 9th 1883; Statutes and Amendments, 1883, p. 65; went into effect immed- iately.)

SEC. 3668. "Within ten days after the fourth "Monday in October, the Controller must publish "a notice for two weeks, in one daily newspaper "of general circulation at the State Capital, and

"in two daily newspapers of general circulation "published in the city of San Francisco, specifying:

"1. That he has received from the State Board "of Equalization the 'duplicate record of assess- "ments of railways,' and the 'duplicate record of "apportionment of railway assessments';

"2. That the taxes are now payable, and will "be delinquent on the last Monday in December "next, at 6 o'clock P. M., and that unless paid to the "State Treasurer at the Capitol prior thereto, five "per cent. will be added to the amount thereof. "On the last Monday in December of each year, "at 6 o'clock P. M., all of unpaid taxes are delin- "quent, and thereafter there must be collected by "the State Treasurer, or other proper officer, an "addition of five per centum, which sum, when col- "lected, must be set aside by the Treasurer as a "fund with which to pay the contingent expenses "of actions against any delinquents, the said ex- "penses to be audited by the Board of Examin- "ers. When any taxes are paid to the State Treas- "urer by order of the Controller, upon assess- "ments made and apportioned by the State Board "of Equalization, the Controller must forthwith "notify the Auditor and Treasurer, respectively, "of each county, and city and county, that such "taxes have been paid, and of the amount thereof "to which each county, and city and county, in- "terested, is entitled. The State's portion of the "taxes must be distributed by the Treasurer to "each fund entitled thereto, and the portion be- "longing to the counties, and cities and counties,

"must be placed in a fund to be called 'Rail-
"way Tax Fund,' to the credit of each county, and
"city and county entitled thereto. When any
"taxes are placed in the 'Railway Tax Fund' to
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SEC. 3669. "Each corporation, person, or as-
"sociation assessed by the State Board of Equaliz-
"ation must pay to the State Treasurer, upon the
"order of the Controller, as other monies are re-
"quired to be paid into the Treasury, the state
"and county, and city and county taxes, each
"year levied upon the property so assessed to it
"or him by said board. Any corporation, person,
"or association dissatisfied with the assessment
"made by the board upon the payment of the tax-
"es due upon the assessment complained of, and
"the five per cent. added, if to be added, on or
"before the first Monday in February, and the fil-
"ing of notice with the Controller of an intention
"to begin an action, may, not later than the first
"Monday of February, bring an action against
"the State Treasurer, for the recovery of the
"amount of taxes and percentage so paid to the
"Treasurer, or any part thereof; and in the com-
"plaint may allege any fact tending to show the
"illegality of the tax, or of the assessment upon

"which the taxes are levied, in whole or in part. "A copy of the complaint and of the summons "must be served upon the Treasurer within ten "days after the complaint has been filed, and the "Treasurer has thirty days within which to demur "or answer. At the time the Treasurer demurs "or answers he may demand that the action be "tried in the Superior Court of the County of "Sacramento. The Attorney General must defend "the action. The provisions of the code of civil "procedure, relating to pleadings, proofs, trials "and appeals are applicable to the proceedings "herein provided for. If the final judgment be "against the Treasurer, upon presentation of a "certified copy of such judgment to the Control-"ler, he shall draw his warrant upon the State "Treasurer, who must pay to the plaintiff the "amount of the taxes so declared to have been il-"legally collected, and the cost of such action, "audited by the Board of Examiners, must be paid "out of any money in the general fund of the "Treasury, which is hereby appropriated; and the "Controller may demand and receive from the "county, or city and county interested the pro-"portion of such costs, or may deduct such pro-"portion from any money then or to become due "to said county, or city and county. Such ac-"tion must be begun on or before the first Mon-"day in February of the year succeeding the year "in which the taxes were levied, and a failure to "begin such action is deemed a waiver of the "rights of action."

SEC. 3670. "After the first Monday of Feb-
"ruary of each year, the Controller must begin an
"action in the proper court, in the name of the
"People of the State of California, to collect the
"delinquent taxes upon the property assessed by
"the State Board of Equalization. Such suit must
"be for the taxes due the State, and all the coun-
"ties and cities and counties, upon property as-
"sessed by the Board of Equalization, and ap-
"pearing delinquent upon the 'duplicate record
"of apportionment of railway assessments.' The
"demands for state and county, and city and
"county taxes may be united in one action. In
"such action a complaint in the following form
"is sufficient:

[Title of Court.]

"The People of the State of California,
vs.
(Naming the Defendant).

"Plaintiff avers that on the day of ,
"in the year (naming the year), the State Board
"of Equalization assessed the franchise, roadway,
"roadbed, rails, and rolling stock of the defend-
"ant, at the sum of (naming it) dollars: That the
"Board apportioned the said assesment as fol-
"lows: To the county of (naming it) the sum of
"(naming it) dollars, and so on (naming each
"county).

"That the defendant is indebted to plaintiff for
"state and county taxes for the year 18—, in the
"following sums: For state taxes, in the sum of
"(naming it) dollars; for county taxes of the

"county of (naming it), in the sum of (naming it) "dollars. etc., with five per cent. added for non- "payment of taxes. Plaintiff demands payment "for said several sums, and prays that an attach- "ment may issue in form as prescribed in Sec- "tion 540 of the Code of Civil Procedure.—(Signed by the Controller or his Attorney.)

"On the filing of such complaint the clerk "must issue the writ of attachment prayed for, "and such proceedings shall be had as under "writs of attachment issued in civil actions. No "bond nor affidavit previous to the issuing of the "attachment is required. If in such action the "plaintiff recover judgment, there shall be in- "cluded in the judgment as counsel fees—and in "case of judgment of taxes, after suit brought but "before judgment, the defendant must pay as "counsel fees--such sum as the court may deter- "mine to be reasonable and just. Payment of "the taxes or the amount of the judgment in the "case must be made to the State Treasurer. In "such actions the duplicate record of assessments "of railways and the duplicate record of appor- "tionment of railway assessments, or a copy of "them, certified by the Controller, showing unpaid "taxes against any corporation, person, or asso- "ciation, for property assessed by the State "Board of Equalization, is prima facie evidence "of the assessment, the property assessed, the de- "linquency, the amount of the taxes due and un- "paid to the state, and counties, or cities and "counties therein named, and that the corpora- "tion, person or association is indebted to the

"people of the State of California in the amount "of taxes, state and county and city and connty "therein appearing unpaid, and that all the forms "of law in relation to the assessment and levy of "such taxes have been complied with."

(New section, approved March 9, 1883; Statutes and Amendments, 1883, 65; went into effect immediately.)

The general laws of California provide for the assessment and collection of taxes, and also regulate the practice of courts of justice. The Constitution of the State of California, Article IV, Section 25 provides:

SEC. 25. "The legislature shall not pass local "or special laws in any of the following enumerat- "ed cases, that is to say: * * *

"*Third.*—Regulating the practice of courts of "justice. * * *

"*Tenth.*—For the assessment or collection of "taxes. * * *

The People of the State of California commenced an action in a State Court, to recover the taxes claimed to be due from the railroad companies for the fiscal year ending July 1st, 1886. The companies demurred, and among other points, raised the one here stated. The demurrer was sustained, one of the ablest Judges in the State rendering an opinion, holding both upon principle and upon the authority of the decisions of the

highest Court of the State, that the laws in question were special. That they were within the inhibition of the Constitution for two reasons: first, that they regulated the practice of Courts of justice; and second, that they provided for collection of taxes; neither of which could be done by special laws.

From that judgment the People have taken an appeal to the Supreme Court of the State, where the case is now pending.

III.

These Points Decisive.

If these positions are tenable, there will be no occasion to consider the grave questions of constitutional law involved, for in that event the judgment can be affirmed, upon the ground that the assessment could not be the basis of a judgment against the defendant.

Santa Clara Co. *vs.* S. P. R. R., 118 U. S., p. 411.

The Federal Questions Involved.

There are certain Federal Questions which may be raised upon the record, and which will come to the Court for determination, if the case is not disposed of on the State questions.

They are:

1. That defendant's road is a part of a continuous postal and military route, constructed and maintained under the authority of the United States by means in part obtained from the general Government; that the Company having, with the consent of the State, become subject to the requirements, conditions and provisions of the Acts of Congress, it thereby ceased to be merely a State corporation, and become one of the agencies or instrumentalities employed by the general Government to execute its constitutional powers; and that the franchise to operate a postal and military route, for the transportation of troops, munitions of war, public stores, and the mails, being derived from the United States, cannot, without their consent, be subjected to State taxation.

2. That a tax upon defendant's franchise is a tax upon Interstate Commerce.

3. That the provisions of the Constitution and laws of California, in respect to the assessment for taxation of the property of railway corporations, operating railroads in more than one county, are in violation of the Fourteenth Amendment of the Constitution, in so far as they require the assessment of their property at its full money value, without making deduction, as in the case of railroads operated in one county, and of other corporations and of natural persons, for the value of

mortgages covering the property assessed; thus imposing upon the defendant unequal burdens, and to that extent denying to it the equal protection of the law.

4. That the provisions of the Constitution and laws of California, which provide for the assessment of the property of railroad companies operating in two or more counties, deny to such companies the equal protection of the law.

5. That the provisions of the Constitution and laws of the State of California, which provide for the assessment of the property of railroad companies operating in two or more counties, would, if enforced, deprive such companies of their property without due process of law.

These Federal Questions are presented in brief herewith filed in the case of the People of the State of California, Plaintiff in Error, against the Central Pacific Railroad Company, Defendant in Error, calendar No. 664, which case, under the order of this Court, will be argued with this. The defendant in error asks to be permitted to refer to the brief in that case and to make it part hereof.

All of which is respectfully submitted.

HARVEY S. BROWN,

Counsel for Defendant in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1887.—No. 1157.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff in Error,

VS.

THE CENTRAL PACIFIC RAILROAD COMPANY,

Defendant in Error.

Brief on Behalf of Defendant in Error.

HARVEY S. BROWN,
Counsel for Defendant in Error.

SAN FRANCISCO:
BACON & COMPANY, BOOK AND JOB PRINTERS,
Corner Clay and Sansome Streets.

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BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Statement of Case.

This action was commenced on the 26th day of February 1885, in the Superior Court of the City and County of San Francisco, by the People of the State of California against the Central Pacific Railroad Company, to recover certain State and County taxes assessed by the State Board of Equalization on the 16th of August, 1884, against the defendant in error.

The case was removed to the Circuit Court of

the United States for the District of California. There judgment was rendered in favor of the defendant.

The case in this Court stands upon the pleadings and findings, and all of the questions involved are thereon raised.

The answer consists of specific denials of all the matters which go to the validity of the assessment and tax, and these denials would, under the practice in California, have been sufficient to raise every issue passed upon in the findings. (Record, Folios 6 to 10.) By separate answer substantially the same issues were raised. (Record, Folios 10 to 21.) Tender of $169,685.00 was pleaded. (Record, Folios 21 to 23.) This tender was accepted, and the money paid. (Record, Folios 54, 55, and 56.)

Points.

THE ASSESSMENT IS VOID, BECAUSE IT INCLUDES PROPERTY WHICH, UNDER THE CONSTITUTION, THE STATE BOARD OF EQUALIZATION HAD NO RIGHT TO ASSESS.

Section 10 of Article XIII of the Constitution of the State of California reads as follows:

SECTION 10. "All property, except as herein-"after in this section provided, shall be assessed

"in the county, city, city and county, town, town-
"ship or district in which it is situated, in the
"manner prescribed by law. The franchise, road-
"way, road-bed, rails and rolling stock of all rail-
"roads operated in more than one county in this
"State shall be assessed by the State Board of
"Equalization at their actual value, and the same
"shall be apportioned to the counties, cities and
"counties, cities, towns, townships, and districts
"in which such railroads are located, in propor-
"tion to the number of miles of railway laid in such
"counties, cities and counties, cities, towns, town-
"ships and districts."

Section 3665 of the Political Code of California, as amended March 9th, 1883, so far as the same is material to the question, is as follows:

"3665. The State Board of Equalization must
"meet at the State Capitol on the first Monday
"in August, and continue in open session from
"day to day, Sundays excepted, until the third
"Monday in August. At such meeting the
"Board must assess the franchise, roadway, road-
"bed, rails and rolling stock of all railroads oper-
"ated in more than one county. Assessment
"must be made to the corporation, person or asso-
"ciation of persons owning the same, and must be
"made upon the entire railway within the State,
"and must include the right of way, bridges, cul-
"verts, wharves and moles upon which the track
"is laid, and all steamers which are engaged in
"transporting passengers, freights, and passenger

"and freight cars across waters which divide the "road. The depots, stations, shops and buildings "erected upon the space covered by the right of "way are assessed by the Assessor of the County "wherein they are situate * * *."

The fifteenth finding of fact (Transcript, folios 47 and 48) reads as follows:

"XV.

"That on the 16th day of August, 1884, the "State Board of Equalization of the State of Cali- "fornia, pretending to act under and by virtue of "the powers conferred upon it by Sec. 10 of Arti- "cle XIII of the Constiution of the State of Cal- "ifornia, did make a pretended assessment for the "purposes of taxation for the fiscal year of said State "then next ensuing, upon the franchise, roadway, "roadbed, rails and rolling stock and property of "said railroad against defendant. Said pretended "assessment was not made separately upon the fran- "chise, roadway, roadbed, rails and rolling stock, "or any properties of said railroad, but all of said "properties were blended together in making "said assessment, which assessment was then and "there so entered upon the minutes of said Board. "Said assessment is the assessment upon which "the several taxes mentioned in the complaint "herein are based; and no other assessment than "the aforesaid was ever made of said property or "any part thereof, for said fiscal year. Said assess- "ment included all property and kinds of property

"mentioned in Section 3665 of the Political Code "of California, as amended March9, 1883, except "depots, stations, shops and buildings erected up- "on the space covered by the right of way, which "last mentioned property was assessed, as provid- "ed in said section, by local assessors."

The twenty-second finding of fact (Transcript, folio 52) reads as follows:

"XXII.

"The State Board of Equalization, in making "the supposed assessment of said roadway of de- "fendant, did knowingly and designedly include in "the valuation of said roadway the value of fences "erected upon the line between said roadway and "the land of co-terminus proprietors."

Reading the fifteenth finding in connection with section 3665 of the Political Code, it appears that the State Board of Equalization, in making the assessment in question, followed the provisions of that section, and included within the assessment not only the property which it was authorized to include by the State Constitution, but property which the State Constitution provides shall be assessed by the local assessors; to wit, wharves and moles upon which tracks are laid, and steamers engaged in transporting freights and passengers.

Section 3665 is clearly unconstitutional, and

the assessment made in accordance with it must fall. This is no longer an open question; the principle involved having been determined by both this Court and the highest Court of the State of California.

Santa Clara Co. vs. *Southern Pacific R. R. Co.*, 118 U. S., p. 394; *City and County of San Francisco* vs. *Central Pacific R. R. Co.*, 63 Cal. 467.

II.

From the twenty-second finding it appears that the State Board of Equalization, in making the supposed assessment of said railroad, did knowingly and designedly include in the valuation of the roadway the value of the fences erected upon the line between said roadway and the land of coterminus proprietors. The valuation of fences being blended with the valuation of the other properties (Transcript, folio 48) renders the whole assessment void, and brings the case at bar within the very letter of *Santa Clara County* vs. *Southern Pacific Railroad Company*, 118 U. S. 394.

III.

THE STATUTES UNDER WHICH THE PROCEEDINGS IN THIS CASE WERE INSTITUTED IN THE COURT BELOW, AS WELL AS THE STATUTE IN FORCE WHICH PRESCRIBES THE MODE AND MANNER OF COLLECTING TAXES ASSESSED BY THE STATE BOARD OF EQUALIZATION, VIOLATE THE PROVISIONS OF THE STATE CONSTITUTION, AND ARE VOID.

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"ber of miles thereof in each county, or city and "county, the total assessment of the franchise, "roadway, roadbed, rails and rolling stock for pur- "poses of State taxation, the amount of the ap- "portionment of such total assessment to each "county, and city and county, for county and city "and county taxation. Before the third Monday "of October of each year the Clerk of the State "Board of Equalization must prepare and trans- "mit to the Controller of State duplicates of the "'Record of Assessment of Railways,' and 'Rec- "ord of Apportionment of Railway Assessments,' "each certified by the chairman and clerk of the "Board, and to be known respectively as 'Dupli- "cate Record of Assessment of Railways,' and "'Duplicate Record of Apportionment of Railway "Assessments.' In the last named duplicate two "columns must be added, in one of which the "Controller must enter the State taxes due the "State, upon the whole assessment, by each cor- "poration, person or association; and in the other "the county or city and county taxes due upon "the assessment apportioned to each county or "city and county by each corporation, person or "association. The two duplicates constitute the "warrant for the Controller to collect the state and "county and city and county taxes levied upon "such property assessed by the Board, and the "amount of the apportionment of the assessment "to each county, and city and county, respective- ly" (New section, approved March 9, 1883; Statutes and Amendments 1883, p. 65; went into effect immediately.)

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"plaint may allege any fact tending to show the
"illegality of the tax, or of the assessment upon

"which the taxes are levied, in whole or in part. "A copy of the complaint and of the summons "must be served upon the Treasurer within ten "days after the complaint has been filed, and the "Treasurer has thirty days within which to demur "or answer. At the time the Treasurer demurs "or answers he may demand that the action be "tried in the Superior Court of the County of "Sacramento. The Attorney General must defend "the action. The provisions of the code of civil "procedure, relating to pleadings, proofs, trials "and appeals are applicable to the proceedings "herein provided for. If the final judgment be "against the Treasurer, upon presentation of a "certified copy of such judgment to the Control- "ler, he shall draw his warrant upon the State "Treasurer, who must pay to the plaintiff the "amount of the taxes so declared to have been il- "legally collected, and the cost of such action, "audited by the Board of Examiners, must be paid "out of any money in the general fund of the "Treasury, which is hereby appropriated; and the "Controller may demand and receive from the "county, or city and county interested the pro- "portion of such costs, or may deduct such pro- "portion from any money then or to become due "to said county, or city and county. Such ac- "tion must be begun on or before the first Mon- "day in February of the year succeeding the year "in which the taxes were levied, and a failure to "begin such action is deemed a waiver of the "rights of action."

SEC. 3670. "After the first Monday of Feb-
"ruary of each year, the Controller must begin an
"action in the proper court, in the name of the
"People of the State of California, to collect the
"delinquent taxes upon the property assessed by
"the State Board of Equalization. Such suit must
"be for the taxes due the State, and all the coun-
"ties and cities and counties, upon property as-
"sessed by the Board of Equalization, and ap-
"pearing delinquent upon the 'duplicate record
"of apportionment of railway assessments.' The
"demands for state and county, and city and
"county taxes may be united in one action. In
"such action a complaint in the following form
"is sufficient:

[Title of Court.]

"The People of the State of California,
vs.
(Naming the Defendant).

"Plaintiff avers that on the day of ,
"in the year (naming the year), the State Board
"of Equalization assessed the franchise, roadway,
"roadbed, rails, and rolling stock of the defend-
"ant, at the sum of (naming it) dollars: That the
"Board apportioned the said assesment as fol-
"lows: To the county of (naming it) the sum of
"(naming it) dollars, and so on (naming each
"county).

"That the defendant is indebted to plaintiff for
"state and county taxes for the year 18—, in the
"following sums: For state taxes, in the sum of
"(naming it) dollars; for county taxes of the

"county of (naming it), in the sum of (naming it) "dollars, etc., with five per cent. added for non- "payment of taxes. Plaintiff demands payment "for said several sums, and prays that an attach- "ment may issue in form as prescribed in Sec- "tion 540 of the Code of Civil Procedure.—(Signed by the Controller or his Attorney.)

"On the filing of such complaint the clerk "must issue the writ of attachment prayed for, "and such proceedings shall be had as under "writs of attachment issued in civil actions. No "bond nor affidavit previous to the issuing of the "attachment is required. If in such action the "plaintiff recover judgment, there shall be in- "cluded in the judgment as counsel fees—and in "case of judgment of taxes, after suit brought but "before judgment, the defendant must pay as "counsel fees—such sum as the court may deter- "mine to be reasonable and just. Payment of "the taxes or the amount of the judgment in the "case must be made to the State Treasurer. In "such actions the duplicate record of assessments "of railways and the duplicate record of appor- "tionment of railway assessments, or a copy of "them, certified by the Controller. showing unpaid "taxes against any corporation, person, or asso- "ciation, for property assessed by the State "Board of Equalization, is prima facie evidence "of the assessment, the property assessed, the de- "linquency, the amount of the taxes due and un- "paid to the state, and counties, or cities and "counties therein named, and that the corpora- "tion, person or association is indebted to the

"people of the State of California in the amount "of taxes, state and county and city and connty "therein appearing unpaid, and that all the forms "of law in relation to the assessment and levy of "such taxes have been complied with."

(New section, approved March 9, 1883; Statutes and Amendments, 1883, 65; went into effect immediately.)

The general laws of California provide for the assessment and collection of taxes, and also regulate the practice of courts of justice. The Constitution of the State of California, Article IV, Section 25 provides:

SEC. 25. "The legislature shall not pass local "or special laws in any of the following enumerat- "ed cases, that is to say: * * *

"*Third.*—Regulating the practice of courts of "justice. * * *

"*Tenth.*—For the assessment or collection of "taxes. * * *

The People of the State of California commenced an action in a State Court, to recover the taxes claimed to be due from the railroad companies for the fiscal year ending July 1st, 1886. The companies demurred, and among other points, raised the one here stated. The demurrer was sustained, one of the ablest Judges in the State rendering an opinion, holding both upon principle and upon the authority of the decisions of the

highest Court of the State, that the laws in question were special. That they were within the inhibition of the Constitution for two reasons: first, that they regulated the practice of Courts of justice; and second, that they provided for collection of taxes; neither of which could be done by special laws.

From that judgment the People have taken an appeal to the Supreme Court of the State, where the case is now pending.

IV.

These Points Decisive.

If these positions are tenable, there will be no occasion to consider the grave questions of constitutional law involved, for in that event the judgment can be affirmed, upon the ground that the assessment could not be the basis of a judgment against the defendant.

Santa Clara Co. *vs.* S. P. R. R, 118 U. S., p. 411.

The Federal Questions Involved.

There are certain Federal Questions which may be raised upon the record, and which will come to the Court for determination, if the case is not disposed of on the State questions.

They are:

1. That defendant's road is a part of a continuous postal and military route, constructed and maintained under the authority of the United States by means in part obtained from the general Government; that the Company having, with the consent of the State, become subject to the requirements, conditions and provisions of the Acts of Congress, it thereby ceased to be merely a State corporation, and become one of the agencies or instrumentalities employed by the general Government to execute its constitutional powers; and that the franchise to operate a postal and military route, for the transportation of troops, munitions of war, public stores, and the mails, being derived from the United States, cannot, without their consent, be subjected to State taxation.

2. That a tax upon defendant's franchise is a tax upon Interstate Commerce.

3. That the provisions of the Constitution and laws of California, in respect to the assessment for taxation of the property of railway corporations, operating railroads in more than one county, are in violation of the Fourteenth Amendment of the Constitution, in so far as they require the assessment of their property at its full money value, without making deduction, as in the case of railroads operated in one county, and of other corporations and of natural persons, for the value of

mortgages covering the property assessed; thus imposing upon the defendant unequal burdens, and to that extent denying to it the equal protection of the law.

4. That the provisions of the Constitution and laws of California, which provide for the assessment of the property of railroad companies operating in two or more counties, deny to such companies the equal protection of the law.

5. That the provisions of the Constitution and laws of the State of California, which provide for the assessment of the property of railroad companies operating in two or more counties, would, if enforced, deprive such companies of their property without due process of law.

These Federal Questions are presented in brief herewith filed in the case of the People of the State of California, Plaintiff in Error, against the Central Pacific Railroad Company, Defendant in Error, calendar No. 664, which case, under the order of this Court, will be argued with this. The defendant in error asks to be permitted to refer to the brief in that case and to make it part hereof.

All of which is respectfully submitted.

HARVEY S. BROWN,

Counsel for Defendant in Error.

127-1

Supreme Court U. S.
JAN 5 1888
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellant,

VS.

THE CENTRAL PACIFIC RAILROAD COMPANY,
Respondent.

THE SAME,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY.

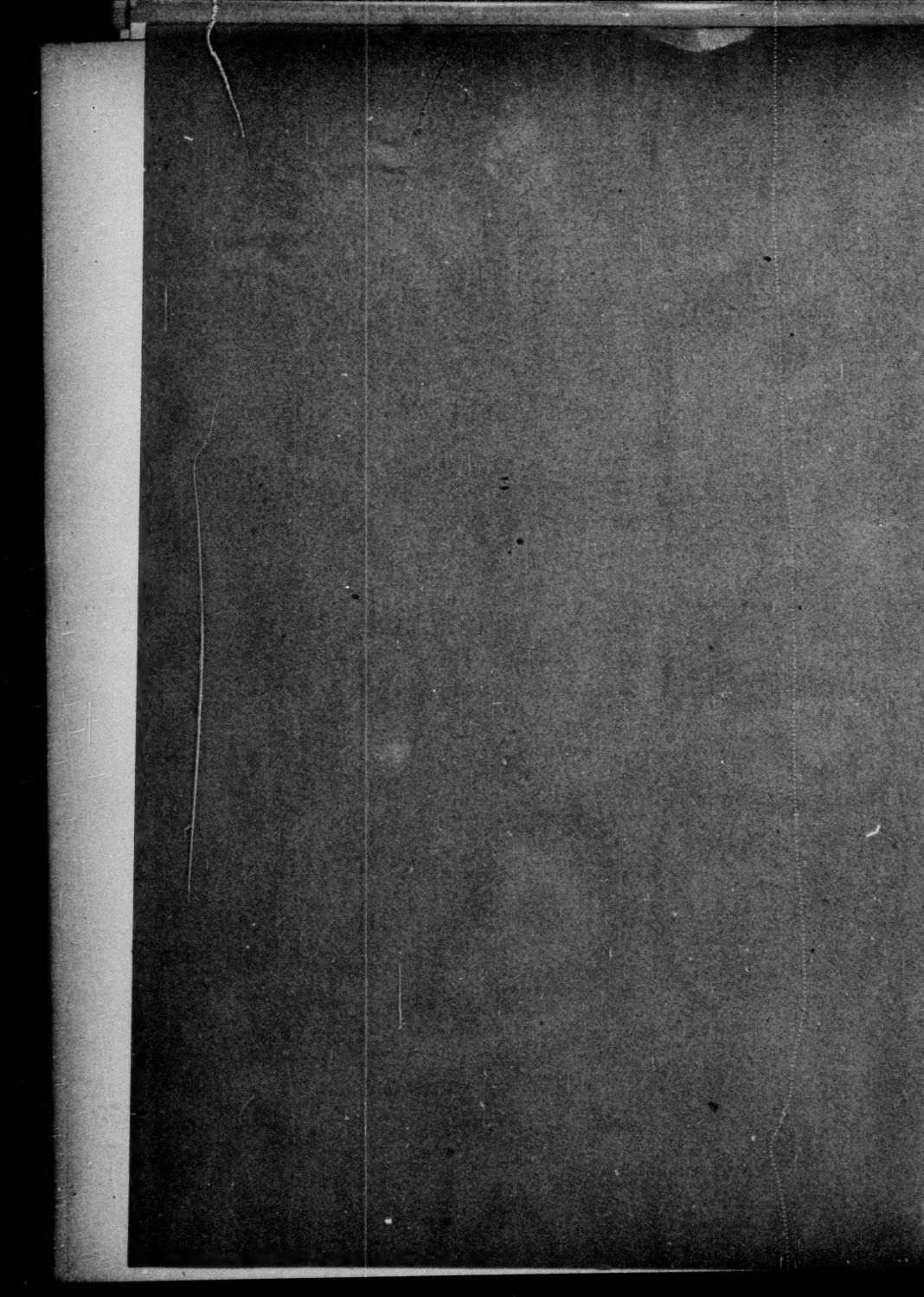
THE SAME,
vs.
CALIFORNIA PACIFIC RAILROAD COMPANY.

THE SAME,
vs.
SAN PABLO & TULARE RAILROAD COMPANY.

THE SAME,
vs.
NORTHERN RAILWAY COMPANY.

Argument of Harvey S. Brown,

Attorney for Respondents.



IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellant,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY,
Defendant and Respondent.

THE SAME,
vs.
NORTHERN RAILWAY COMPANY.

THE SAME,
vs.
SAN PABLO AND TULARE RAILROAD COMPANY.

THE SAME,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY.

THE SAME,
vs.
CALIFORNIA PACIFIC RAILROAD COMPANY.

STATEMENT OF CASE.

For the convenience of Court and counsel, and in order to place the facts at once before the Court, I have deemed it best to here copy one Complaint, one Demurrer, and the Opinion of the Court below as all the complaints are in the form prescribed by Sec. 3670 of the Political Code.

COPY COMPLAINT.

"*In the Superior Court of the City and County of San Francisco, State of California.*

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

VS.

THE CENTRAL PACIFIC RAILROAD COMPANY,
Defendant.

Plaintiff avers that on the 14th day of August, in the year eighteen hundred and eighty-six, the State Board of Equalization assessed the franchise, roadway, road-bed, rails and rolling stock of the defendant at the sum of $20,000,000. That the Board apportioned the said assessment as follows: To the County of Alameda, the sum of $2,607,230; to the County of Butte, the sum of $1,404,758; to the County of Fresno, the sum of $1,877,068; to the County of Merced, the sum of $1,147,219; to the County of Nevada, the sum of $944,309; to the County of Placer, the sum of $3,519,698; to the County of Sacramento, the

sum of $1,279,890; to the County of San Joaquin, the sum of $1,771,555; to the County of Santa Clara, the sum of $265,343; to the County of Shasta, the sum of $1,835,550; to the County of Sierra, the sum of $67,116; to the County of Stanislaus, the sum of $706,437; to the County of Sutter, the sum of $312,168; to the County of Tehama, the sum of $1,265,530; to the County of Tulare, the sum of $423,925; to the County of Yuba, the sum of $495,411; and to the City and County of San Francisco, the sum of $76,793.

That the defendant is indebted to plaintiff for State and County taxes for the year eighteen hundred and eighty-six, in the following sums: For State taxes in the sum of $112,000; for County taxes of the County of Alameda, in the sum of $16,225.34; for County taxes of the County of Butte, in the sum of $13,154.46; for County taxes of the County of Fresno, in the sum of $18,582.97; for County taxes of the County of Merced, in the sum of $14,225.61; for County taxes of the County of Nevada, in the sum of $16,430.97; for County taxes of the County of Placer, in the sum of $34,845.01; for County taxes of the County of Sacramento, in the sum of $8,035.21; for County taxes of the County of San Joaquin, in the sum of $7,733.65; for County taxes of the County of Santa Clara, in the sum of $1,575.82; for County taxes of the County of Shasta, in the sum of $31,020.79; for County taxes of the County of Sierra, in the sum of $1,436.28; for

County taxes of the County of Stanislaus, in the sum of $5,449.32; for County taxes of the County of Sutter, in the sum of $1,685.70; for County taxes of the County of Tehama, in the sum of $15,620.77; for County taxes of the County of Tulare, in the sum of $4,832.74; for County taxes of the County of Yuba, in the sum of $11,417.03; and for City and County taxes of the City and County of San Francisco, in the sum of $776.37; with five per cent added to each of said several sums, for non-payment of taxes.

Plaintiff demands judgment for said several sums, with five per cent added thereto, together with costs and counsel fees, as allowed by law, and prays that an attachment may issue in form, as prescribed in Section five hundred and forty, of the Code of Civil Procedure.

D. M. DELMAS,
Attorney for Plaintiff
And the Controller."

COPY DEMURRER.

(Title of Cause.)

"The defendant comes and demurs to the complaint of the plaintiff herein, and assigns the following grounds, to wit:

First.—That the Court has no jurisdiction of the subject matter of the action, nor the person of the defendant herein.

Second.—That the plaintiff has not the legal capacity to sue herein, for the following reasons: That Sections 3668–3669 and 3670 of the Political Code, under the provisions of which said action was instituted, are unconstitutional and void in this; that said sections are in contravention of Subdivisions 3rd and 10th of Section 25 of Article IV of the Constitution of the State of California; they also are in contravention of Section 21 of Article I of the Constitution of the State of California, and of Section I of Article XII of the Constitution of the State of California; that said sections of the Political Code are in contravention of Section one of the 14th Amendment of the Constitution of the United States; that so far as the assessment of railroad property is concerned, Sections 4 and 10 of Article XIII of the State Constitution, upon which the said action is founded, are in contravention of Section one of the 14th Amendment of the Constitution of the United States.

Third.—That several causes of action have been improperly united.

Fourth.—That several causes of action have been improperly united, which are not separately stated in the complaint; that is to say,

I.

A cause of action for State taxes.

II.

A cause of action for county taxes of the county of Alameda.

III.

A cause of action for county taxes of the county of Butte.

IV.

A cause of action for county taxes of the county of Fresno.

V.

A cause of action for county taxes of the county of Merced.

VI.

A cause of action for county taxes of the county of Nevada.

VII.

A cause of action for county taxes of the county of Placer.

VIII.

A cause of action for county taxes of the county of Sacramento.

IX.

A cause of action for county taxes of the county of San Joaquin.

X.

A cause of action for county taxes of the county of Santa Clara.

XI.

A cause of action for county taxes of the county of Shasta.

XII.

A cause of action for county taxes of the county of Sierra.

XIII.

A cause of action for county taxes of the county of Stanislaus.

XIV.

A cause of action for county taxes of the county of Sutter.

XV.

A cause of action for county taxes of the county of Tehama.

XVI.

A cause of action for county taxes of the county of Tulare.

XVII.

A cause of action for county taxes of the county of Yuba.

XVIII.

A cause of action for city and county taxes of the City and County of San Francisco.

Fifth.—That the complaint does not state facts sufficient to constitute a cause of action.

Sixth.—That the complaint is ambiguous, unintelligible and uncertain in this: That it does not appear how or when defendant became indebted for taxes; that it does not appear how or when five per cent was added.

Wherefore, defendant prays judgment against plaintiff, and that it may have its costs in this behalf expended.

H. S. BROWN,
Attorney for Defendant."

OPINION OF THE COURT BELOW.

These actions were instituted to recover taxes alleged to be due to the State and the several counties through which the several roads are located. Each complaint contains but a single count, and it is in the form prescribed by Section 3,670, P. C.

The Constitution of the State prescribes two modes of assessing property subject to taxation. Both methods are set forth in Section 10 of Article XIII of the Constitution, which reads as follows:

"All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails and rolling-stock of all railroads operated in more than one county in this State, shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts."

Thus all the taxable property of or within the State, except the franchise, roadway, road-bed, rails and rolling-stock of railroads operated in more than one county, must be assessed in the county, city, city and county, town, township or district in which it is situated.

The complaints in these actions have been demurred to upon the various grounds mentioned in Section

430, C. C. P., and the assessments and mode of collecting the taxes upon railroads are attacked on the ground that the whole method is a violation of the Fourteenth Amendment of the Constitution of the United States, and of various provisions of the State Constitution, which will be hereafter particularly referred to.

The view taken herein of the method prescribed for the collection of railroad taxes, renders it unnecessary to consider the mode of assessing this kind of property, as the Supreme Court of this State has passed upon that question heretofore.

It is claimed by the defendants, first, that Sections 3,668, 3,669 and 3,670, P. C., are unconstitutional and void, because they conflict with Sub-division 3, of Section 25, of Article IV, of the Constitution of the State.

Section 25. "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * * Third—Regulating the practice of Courts of Justice."

It is urged that the Code of Civil Procedure affords a complete system of practice in all civil actions; that it defines who shall be parties to an action; when and how an action shall be commenced; what the complaint shall contain; when it may be demurred to and how answered, and when it shall be verified, and what costs shall be allowed on judgment and when an attachment shall issue and judgment be enforced.

The adoption of a particular form of complaint for the recovery of a moneyed judgment against a particular class of defendants, especially when that complaint would be insufficient under the Code of Civil Procedure, is a plain and palpable violation of this provision of the Constitution.

Section 426, C. C. P., among other things, requires the complaint to contain a statement of the facts constituting the cause of action in ordinary and concise language. Do the complainants in question, copied from Section 3,670, P. C., comply with this requirement? The complaint simply avers that the State Board of Equalization assessed the franchise,

roadway, road-bed, rails and rolling-stock of the defendant at the sum of — dollars, and that the Board apportioned the said assessment as follows: to the county of — so many dollars, and so on, naming each county. There is no averment from first to last that any tax was ever levied by the State Board or by any of the named counties, nor that the tax is delinquent or unpaid. The assessment of the property and the apportionment of the same to the various counties are simply steps necessarily taken prior to the levy of the tax. An assessment without a levy of a tax would no more create a liability to pay a certain or any tax than would a levy of a tax without any assessment. They are both equally important and necessary in order to be binding.

The averment that defendant is indebted to the plaintiff for such an amount of taxes for the year 1886, is not such a statement of a cause of action as is required by the C. C. P. It is a conclusion of law at best, depending entirely upon the facts.

The complaint is singularly lacking in other respects. There is no averment that the defendant is a corporation; neither is there any averment that the defendant is the owner or possessor of the property in question, nor any other allegation that even tends to show defendant's liability.

But the defects of these complaints do not end here. From three to eighteen different causes of action are improperly united in them in one count, when they should have been separately stated. This defect becomes more apparent when the mode of designating the amount and levying of the various taxes is considered. By the provisions of Section 3,696, P. C., the State Board of Equalization is required between the first and third Mondays in September of each year to determine the rate of State tax to be levied and collected upon the assessed valuation of the property of the State, and said Board must immediately thereafter transmit to the Board of Supervisors and County Auditor of each county a statement of such rate. After the receipt of this information, to wit, on the first Monday of October, the Board of Super-

visors of each county must fix the rate of the county, designating the number of cents of each hundred dollars of property levied for each fund, and must levy the State and county taxes upon the taxable property of the county. (Section 3,714, P. C.)

By the provisions of Section 3,715, P. C., the action of the State Board of Equalization, in fixing the rate of taxation for State purposes, is, in the absence of action by the Board of Supervisors, a valid levy of the rate so fixed. The rate of State taxes would be the same in each county, but the rate of the county tax would depend entirely upon the wants of the county and the will of the Board of Supervisors, and could not be the same in any two counties except by accident, as each cause of action for county taxes would depend entirely upon the action of as many different Boards of Supervisors as there are counties, in which the defendant's railroad is operated. It would seem, upon general principles, as well as by the provisions of the Code of Civil Procedure, to be essential and absolutely necessary to have said several causes of action separately stated.

The remaining questions upon this point are first, when the Legislature has declared a complaint to be sufficient that lacks the essential elements of good pleading, does it bind the courts? and second, is not such legislation in conflict with Subdivision 3, Section 25, Article IV of the State Constitution?

As to the first of these two questions, it is settled that it is clearly within the power of the Legislature to establish general rules and prescribe the mode and manner of pleading in the absence of Constitutional restriction, and may by special laws prescribe different rules and modes in different classes of cases. These rules are and must be subject to interpretation by the judiciary. If the Legislature attempts to determine in advance that a certain pleading established by a certain law or any law is a sufficient pleading, it is a clear usurpation of the functions of the judiciary. The case of *Whiting* vs. *Townsend*, 57 Cal., 515, is not an authority that sustains the contention of plaintiff. That was an action brought to enforce a

street assessment lien, and proceedings were had on a supplemental Act to certain Acts concerning the City and County of San Francisco, passed April 1, 1872. See Statutes of 1872, pages 809 to 816. Section 13, among other things, provides that in bringing an action to recover street assessments, the complaint need not show any proceedings prior to the issuance of the assessment, diagram and certificate, but it shall be legally sufficient if it shows the title of the Court in which the action is brought by the parties plaintiff and defendant, the date of issuance of the assessment, the date of recording thereof, the book and page where recorded, a general statement of the work done, the description of the lot or lots sought to be charged with the assessment, the amount assessed thereon, and that the sum remains unpaid, and the proper prayer for relief. The cause of action having arisen and suit having been commenced before there was any constitutional inhibition, the Court held that the Legislature had the right to provide such a rule of pleading.

Does the law conflict with Subdivision 3 of Section 25, Article IV of the Constitution? It certainly regulates the practice of Courts of Justice in the few cases named. It prescribes an exact form of complaint, differing in every essential particular from that prescribed by the Code. It provides for an attachment without affidavits or bond. It provides for the payment of counsel fees if the suit be settled before judgment. In case of judgment it provides that the judgment shall include counsel fees in such sum as the Court may deem reasonable, none of which things can be done under the Code of Civil Procedure. The conclusion is irresistible that the legislation in question is unconstitutional and void. It is also urged that the legislation in question is in contravention of Subdivision 10, Section 25, Article IV of the State Constitution, which provides that the Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * * Tenth—"For the assessment or collection of taxes." So far as the assessment of railroad property is con-

cerned, by the State Board of Equalization, as the Constitution itself makes a different provision for the assessment of railroad property operated in more than one county from that required for the assessment of all other property in the State, and as the Political Code simply follows the provisions of the Constitution, it is plain that the assessments are not assailable under the subdivision above quoted. But while a separate assessment of their property is directed by State instead of county officers, and is therefore not assailable upon State Constitutional grounds, yet there is nothing in the Constitution to indicate that the taxes were intended to be collected upon such roads operated in more than one county in any manner different from the collections of taxes upon other property. On the contrary, it is very apparent that it was the intention of the framers of the Constitution that all taxes levied thereon were to be collected in the same manner and by the same officers as other taxes. When Section 10, Article XIII of the Constitution before cited, required the State Board of Equalization, after assessing any such railroad, to apportion said assessment to the counties, cities and counties, cities, towns, townships and districts, in which such railroads are located in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts, it was for the undoubted purpose of allowing the county, city and county, city, township and district officers, not only to levy, but to collect the tax the same as collected upon other property, and it will be seen by reading the last sentence of Section 3,671, P. C., that even now the taxes upon township, road, school or other local districts shall be collected in the same manner as the county taxes. All taxes levied upon all property of the State of California, except State and county taxes levied upon railroads operated in more than one county, are payable in the county where the property is situated, and payable to the county tax collectors or city and county, city, township or district tax collectors. It is claimed by the owners of such railroads that under the general revenue laws all other tax-payers, not

only have the right to pay the taxes in the county in which their property is situated, but should the tax become delinquent and advertised as such, they can still pay the taxes and percentage and the sum of 50 cents costs on each piece of property so advertised, without further costs; and in case the property is sold for non-payment of taxes they can redeem the same at any time twelve months thereafter and thirty days after receiving notice from the purchaser that he will apply for a deed.

They also claim that rules applying to the owners of railroads operating in more than one county as to the collection of State and county taxes are specially onerous, unconstitutional and void in the following particulars:

First—The requirement to pay said State and county taxes at the State Capitol to the State Treasurer, upon the order of the Controller.

Second—The commencement of a suit to collect such taxes without offering the property at first for sale as in other cases.

Third—Making the defendant liable to pay not only the ordinary costs of suit, but counsel fees also.

Fourth—The issuing of an attachment and attaching any and all property not exempt from execution, and, in case of judgment, selling the same instead of enforcing the lien against the property itself.

Fifth—In case of the sale of the property under execution, limiting the time of repayment to six months, instead of twelve months, when sold by the Tax Collector.

If this is a special law, there is no doubt that it is unconstitutional and void. The Court is not without authority upon this point. Ex parte Westerfield, 55 Cal., 550, involved the construction of an Act of the Legislature entitled, "An Act to regulate and provide a day of rest in certain cases, approved April 16, 1880." The Act provided that it should be unlawful for any person engaged in the business of baking to engage or permit others in his employ to engage in the labor of baking, for the purposes of sale, between

the hours of 6 o'clock P. M. on Saturday, and 6 o'clock P. M. on Sunday, etc. The petitioner violated this law, was arrested therefor, whereupon a writ of habeas corpus was sued out and the same was heard by the Supreme Court in bank. Mr. Justice Myrick, in delivering the opinion, said: "This is special legislation. A certain class is selected. Now, if there be authority to restrain labor on some one day, it must be, if at all, under a general law restraining labor on that day."

Justice McKinstry, in concurring, said: "But admitting the constitutionality of general laws prohibiting all labor upon Sunday, or upon any other day, I think the Act of April 16, 1880, is a special law within the meaning of those terms as employed in Section 25, Article IV, of the present Constitution. * * * To say that every law is general within the meaning of the Constitution, which bears equally upon all to whom it is applicable is to say that there can be no special laws."

This decision and the language quoted is peculiarly applicable to the case under consideration. The class of persons affected by the Baker's Act numerically considered, amounted to hundreds, if not thousands, while the number of railroads operated in more than one county is less than a score. All the Justices except Justice Ross and Justice McKee, who did not hear the argument, concurred in the judgment. But aside from the number of persons affected, the legislation in question is, if possible, more objectionable than the Baker's Act, for the reason that that Act applied to all persons of that class, while this is applicable only to a portion of a class. There are a number of well-known classes of railroads—there are broad-gauge railroads, narrow-gauge railroads, steam railroads, electrical railroads, gravitation railroads, horse railroads, and cable railroads, but the legislation in question does not relate to any of these well-known classes of railroads. As well might the legislature arbitrarily make Sections 3,668, 3,669, 3,670 applicable to railroads, 10, 20, 50, 100 or any other number of miles in length, and then claim that the law

was general and not special, as to claim that the present law is a general law. In *Earle* vs. *The Board of Education of San Francisco* (55 Cal., 489), the Court in bank passed upon the constitutionality of an Act which added a new section to the Political Code, which established the salaries to be paid teachers in the public schools in all consolidated cities and counties containing more than 100,000 inhabitants. The Court held that the section violated Section 25 of Article IV of the Constitution, which prohibits special and local legislation.

Upon principle and authority, the conclusion is irresistible that Sections 3,669 and 3,670 of the Political Code, as amended in 1883, are in direct conflict with Section 25, Article IV of the Constitution and are therefore void.

It is also claimed that the legislation in question is in direct contravention of Section 1, Article XII of the Constitution, which reads as follows: "Corporations may be formed under general laws, but shall not be created under special act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

The old Constitution (Section 31, Article IV) had the following: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

It will be observed that so far as private corporations are concerned the provisions of the two Constitutions are the same, though clothed in different language. It has been claimed by some that this reservation of power to alter, amend or repeal conferred ample authority upon the legislature to adopt the system for the collection of taxes from railroad companies now under discussion. This reservation of power may be so wielded as to completely change all corporation laws, or strike them from the statute books by an absolute repeal of all laws bearing upon that subject, and therefore prohibit the formation of

such corporation, but in altering or amending such laws, it cannot free some of a class and burden the others. All must be treated alike in this respect or the law becomes special and not general and infringes upon the Constitution.

This question has been carefully considered and determined in the great case of *The City and County of San Francisco* vs. *The Spring Valley Water Works*, reported in 48th Cal., 493. Mr. Justice Crockett, who delivered the opinion of the Court, in speaking of corporations, said :

"They can only be formed under general laws, and can exercise no powers except such as are derived from general laws * * * The general laws under which they were formed, and such others as shall afterwards be enacted, must alone define their rights and powers. On this theory, all private corporations formed for similar purposes, will stand upon the same footing, enjoy the same rights and be subject to the same burdens, which cannot be increased or diminished, except by general laws applicable to all."

Justice McKinstry, in a concurring opinion said: "The Legislature could neither confer a benefit nor impose an obligation on the Spring Valley Water Works, not conferred or imposed on all water companies by the general law. To confer a special benefit or impose a special obligation would be equally destructive of the uniformity which it is the object of Section 31 of Article IV of the Constitution to secure."

The same learned Justice, on page 532, says : "The rights and duties of all corporations formed under the general law providing for the incorporation of water companies are fixed and determined by its terms, and can only be changed or modified by amendment of the general law. And every such amendment must be applicable to all corporations created under the general law."

In the case of the *Spring Valley Water Company* vs. *Bryant*, 52d Cal., 132, the Supreme Court held that certain Acts of the Legislature, so far as they attempted to provide a mode of fixing the rates to be

charged by companies furnishing water to the inhabitants of San Francisco, differing from that provided for establishing the rates to be allowed to other companies formed under the general laws, are unconstitutional and void.

The same doctrine was laid down in the case of the *Waterloo Turnpike Road Company* vs. *J. H. Cole*, 51st Cal., 381.

In the case of the *Omnibus Railroad Company* vs. *Baldwin*, Mr. Justice McKinstry, after stating that this section of the Constitution had been judicially considered in the aforementioned case, and reaffirming the same doctrine, said: "I do not propose to fortify the reasoning of Mr. Justice Crockett in *San Francisco* vs. *Spring Valley Water Works*. In itself, eminently satisfactory, it accords with established canons of constitutional and statutory construction. My purpose is simply to show that, to the extent above intimated, the construction of the provision of the Constitution has been settled by the highest tribunal of the State." This point having been finally settled by the highest tribunal of the State, the remaining question is, Does the legislation in question apply to all railroad corporations organized under the general law? If so, then the reservation of the power to alter or amend might be invoked to sustain it; but if, on the contrary, it only affects a portion of said railroad corporations, then it is unconstitutional and void. The general law for the incorporation of railroad companies, under both the old and new Constitutions, is the same whether the object was to construct in one or all the counties of the State. All had the same powers and duties and were subject to the same obligations. There are in this State nearly, if not quite, as many railroads operated only in one county. as there are operated in more than one county.

The provision of the Political Code, before referred to, does not impose upon the railroads operated in one county the duties or obligations imposed upon those operated in more than one county. The three county railroads in Los Angeles, the three county railroads in Alameda, the three county railroads in Contra

Costa, the two county railroads in Santa Cruz, the two county railroads in Humboldt, the one county railroad in Colusa, and the one county railroad in Tulare, are not compelled to go to the State Capitol and there pay their State and county taxes to the State Treasurer, after obtaining an order from the Controller for the State Treasurer to receive the same; and should the tax on their railroads become delinquent, they are not subject to a suit and attachment and costs of suit and counsel fees, until their roads, the property assessed, and upon which the tax has been levied, have been advertised and offered for sale, and no bidders are found to take the same. The tax upon their property can only be made out of the identical property assessed, provided any bidder shall take it and pay the tax, percentage and costs, and after that time he has at least twelve months in which to redeem.

Under the decisions before cited, the reservation of the power to alter, amend or repeal, so far from sustaining the section of the Political Code in question, determine that the said sections are unconstitutional.

But we now come to the last question herein considered. It is claimed that the provisions of the State Sections 3,668, 3,669, and 3,670 are in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States; that the State denies to them the equal protection of the laws.

In the case of the *Central Pacific Railroad Company* vs. *State Board of Equalization*, reported in 60 Cal., page 35, the Supreme Court held that the provision of said Section 1, that no State shall deny to any person within its jurisdiction the equal protection of the laws, applied to natural persons and did not apply to corporations or artificial persons, and that question having been passed upon in the case of *Santa Clara County* vs. *The Southern Pacific Railroad Company*, in 118th United States Report, page 393, it is unnecessary in this proceeding for me to pass upon said question.

For the reasons above stated, the complaints in these actions cannot be sustained, and it is ordered

that judgment be entered in favor of defendants, sustaining the demurrers in each of the above cases.

LEVY, Judge.

Provisions of the State Constitution, in Reference to the Assessment of Property.

SECTION 1 OF ARTICLE XIII.—"All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; *provided*, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to *bona fide* residents of this State."

SECTION 4 OF ARTICLE XIII. "A mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other quasi public corporations, in case of debts so secured, the value

of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof; *provided*, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year."

SECTION 10 OF ARTICLE XIII. "All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and

districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts."

Scheme for the Assessment and the Levying of Taxes and the Collection of the Same Upon Railroad Property of Railroads Operated in More Than One County—Political Code of the State of California.

SECTION 3665. "The State Board of Equalization must meet at the State Capitol on the first Monday in August, and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the Board must assess the franchise, roadway, road-bed, rails and rolling stock of all railroads operated in more than one county. Assessment must be made to the corporation, person, or association of persons owning the same, and must be made upon the entire railway within the State, and must include the right of way, bridges, culverts, wharves and moles upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road. The depots, stations, shops and buildings erected upon the space covered by the right of way, are assessed by the assessor of the county wherein they are situate. Within ten days after the third Monday of

August, the Board must apportion the total assessment of the franchise, roadway, road-bed, rails, and rolling stock of each railway to the counties, or cities and counties, in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and counties. The Board must also, within said time, transmit by mail to the County Auditor of each county, or city and county, to which such apportionment shall have been made, a statement showing the length of the main track of such railway within the county, or city and county, with a description of the whole of the said track within the county, or city and county, including the right of way by metes and bounds or other description sufficient for identification, the assessed value per mile of the same as fixed by a pro rata distribution per mile of the assessed value of the whole franchise, roadway, road-bed, rails, and rolling stock of said railway within the State, and the amount apportioned to the county, or city and county. The Auditor must enter the statement on the assessment roll or book of the county, or city and county, and where the county is divided into assessorial townships or districts, then on the roll or book of any township or district he may select, and enter the amount of the assessment apportioned to the county, or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation either of the county, city and county, or such township or district. On the first

Monday in October the Board of Supervisors must make, and cause to be entered in the proper record book, an order stating and declaring the length of main track of the railway assessed by the State Board of Equalization within the county; the assessed value per mile of said railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school and road district, or lesser taxing district in the county, or city and county, through which said railway runs, as fixed by the State Board of Equalization, which shall constitute the assessment value of said property for taxable purposes in such city, town, township, school, road, or other district; and the Clerk of the Board of Supervisors must transmit a copy of each order or equalization to the City Council or Trustees, or other legislative body of incorporated cities or towns, the Trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes as the property of individuals within such city, town, township, school, road, and lesser taxation districts respectively. If the owner of a railway assessed by the State Board of Equalization is dissatisfied with the assessment made by the Board, such owner may, at the meeting of the Board, under the provision of Section three thousand six hundred and ninety-two of the Political Code, between the third Mon-

day in August and the third Monday in September, apply to the Board to have the same corrected in any particular, and the Board may correct and increase or lower the assessment made by it, so as to equalize the same with the assessment of other property in the State. If the Board shall increase or lower any assessment previously made by it, it must make a statement to the County Auditor of the county affected by the change in the assessment, of the change made, and the Auditor must note such change upon the assessment book or roll of the county as directed by the Board. [In effect March 9, 1883.]"

SECTION 3666. "The State Board of Equalization must prepare each year a book, to be called 'Record of Assessment of Railways,' in which must be entered each assessment made by the Board, either in writing, or by both writing and printing. Each assessment so entered must be signed by the Chairman and Clerk. The record of the apportionment of the assessments made by the Board to the counties, and cities and counties, must be made in a separate book, to be called "Record of Apportionment of Railway Assessments." In such last described book must be entered the names of the railways assessed by the Board, the names of the corporation to which, or the name of the person or association to whom, each railway was assessed, the whole number of miles of the railway in the State, the number of miles thereof in each county, or city and county, the total assessment of the franchise, roadway, road-bed, rails, and rolling stock for purposes

of State taxation, and the amount of the apportionment of such total assessment to each county, and city and county, for county, and city and county taxation. Before the third Monday of October of each year the Clerk of the State Board of Equalization must prepare and transmit to the Controller of the State, duplicates of the "Record of Assessment of Railways," and "Record of Apportionment of Railway Assessments," each certified by the Chairman and Clerk of the Board, and to be known respectively as "Duplicate Record of Assessment of Railways," and "Duplicate Record of Apportionment of Railway Assessments." In the last named duplicate two columns must be added, in one of which the Controller must enter the State taxes due the State upon the whole assessment by each corporation, person or association, and in the other the county, or city and county taxes, due upon the assessment apportioned to each county, or city and county, by each corporation, person or association. The two duplicates constitute the warrant for the Controller to collect the State and county, and city and county, taxes levied upon such property assessed by the Board, and the amount of the apportionment of the assessment to each county, and city and county, respectively. [In effect March 9, 1883.]"

SECTION 3667. When the Board of Supervisors of each county, and city and county, to which the State Board of Equalization has apportioned the assessment of railways shall have

fixed the rate of county, or city and county taxation, the Clerk of the Board of Supervisors must forthwith by mail, postage paid, transmit to the Controller a statement of the rate of taxation levied by the Board of Supervisors for county, or city and county taxation. If the Clerk fails to transmit such statement, the Controller must obtain the information as to such rate of taxation from other sources. On or before the fourth Monday of October the Controller must compute and enter in separate money columns in the "Duplicate Record of Apportionment of Railway Assessments" the respective sums, in dollars and cents, rejecting fractions of a cent, to be paid by the corporation, person, or association liable therefor as the State tax upon the total amount of the assessment, and the county, or city and county, tax upon the apportionment of the assessment to each county, and city and county, of the property assessed to such corporation, person, or association named in said duplicate record. [In effect March 9, 1883.]"

SECTION 3668. "Within ten days after the fourth Monday in October, the Controller must publish a notice for two weeks in one daily newspaper of general circulation at the State capitol, and in two daily newspapers of general circulation published in the city of San Francisco, specifying:

1. That he has received from the State Board of Equalization the "Duplicate Record of Assessments of Railways" and the "Duplicate

Record of Apportionment of Railway Assessments."

2. That the taxes are now payable and will be delinquent on the last Monday in December next, at six o'clock P. M., and that unless paid to the State Treasurer at the Capitol prior thereto, five per cent will be added to the amount thereof. On the last Monday in December of each year, at six o'clock P. M., all of unpaid taxes are delinquent, and thereafter there must be collected by the State Treasurer or other proper officer an addition of five per centum, which sum when collected must be set aside by the Treasurer, as a fund with which to pay the contingent expenses of actions against any delinquents, the said expenses to be audited by the Board of Examiners. When any taxes are paid to the State Treasurer by order of the Controller, upon assessments made and apportioned by the State Board of Equalization, the Controller must forthwith notify the Auditor and Treasurer respectively of each county, and city and county, that such taxes have been paid, and of the amount thereof to which each county and city and county interested is entitled. The State's portion of the taxes must be distributed by the Treasurer to each fund entitled thereto, and the portion belonging to the counties, and cities and counties, must be placed in a fund, to be called "Railway Tax Fund," to the credit of each county, and city and county entitled thereto. When any taxes are placed in the "Railway Tax Fund" to the credit of a county, or city and county, the Controller, at the

next settlement with the Controller by the Treasurer of such county, or city and county, must draw and deliver to such Treasurer, his warrant upon the State Treasurer for the amount in the fund to the credit of such county, or city and county. [In effect March 9, 1883.]"

SECTION 3669. "Each corporation, person, or association assessed by the State Board of Equalization must pay to the State Treasurer, upon the order of the Controller, as other moneys are required to be paid into the Treasury, the state and county, and city and county, taxes each year levied upon the property so assessed to it or him by said Board. Any corporation, person or association dissatisfied with the assessment made by the Board, upon the payment of the taxes due upon the assessment complained of, and the five per cent added, if to be added, on or before the first Monday in February, and the filing of notice with the Controller of an intention to begin an action, may, not later than the first Monday of February, bring an action against the State Treasurer for the recovery of the amount of taxes and percentage so paid to the Treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied in whole or in part. A copy of the complaint and of the summons must be served upon the Treasurer within ten days after the complaint has been filed, and the Treasurer has thirty days within which to demur or answer. At the time the Treasurer demurs or

answers, he may demand that the action be tried in the Superior Court of the County of Sacramento. The Attorney-General must defend the action. The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for. If the final judgment be against the Treasurer, upon presentation of a certified copy of such judgment to the Controller, he shall draw his warrant upon the State Treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected, and the cost of such action, audited by the Board of Examiners, must be paid out of any money in the General Fund of the Treasury, which is hereby appropriated; and the Controller may demand and receive from the county, or city and county, interested, the proportion of such costs, or may deduct such proportion from any money then, or to become due to said county, or city and county. Such action must be begun on or before the first Monday in February of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action. [In effect March 9, 1883.]"

SECTION 3670. "After the first Monday of February of each year, the Controller must begin an action in the proper court, in the name of the people of the State of California, to collect the delinquent taxes upon the property assessed by the State Board of Equalization; such suit must be for the taxes due the State, and all the

counties, and cities and counties, upon property assessed by the Board of Equalization, and appearing delinquent upon the 'Duplicate Record of Apportionment of Railway Assessments.'"

The demands for state and county, and city and county taxes, may be united in one action. In such action a complaint in the following form is sufficient:—

[Title of Court.]

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

(NAMING THE DEFENDANT.)

Plaintiff avers that on the day of , in the year (naming the year) the State Board of Equalization assessed the franchise, roadway, road-bed, rails, and rolling stock of the defendant at the sum of (naming it) dollars. That the Board apportioned the said assessment as follows: To the county of (naming it) the sum of (naming it) dollars (and so on naming each county).

That the defendant is indebted to plaintiff for State and county taxes for the year eighteen , in the following sums: For State taxes, in the sum of (naming it) dollars; for county taxes of the county of (naming it), in the sum of (naming it) dollars, etc., with five per cent added for non-payment of taxes. Plaintiff demands payment for said several sums and prays that an attachment may

issue in form as prescribed in section 540 of the Code of Civil Procedure.

(Signed by the Controller or his attorney.)

On the filing of such complaint, the clerk must issue the writ of attachment prayed for, and such proceedings shall be had as under writs of attachment issued in civil actions; no bond nor affidavit previous to the issuing of the attachment is required. If in such action the plaintiff recover judgment, there shall be included in the judgment as counsel fees, and in case of judgment of taxes after suit brought but before judgment, the defendant must pay as counsel fees, such sums as the Court may determine to be reasonable and just. Payment of the taxes or the amount of the judgment in the case must be made to the State Treasurer. In such actions the duplicate record of assessments of railways and the duplicate record of apportionment of railway assessments, or a copy of them, certified by the Controller, showing unpaid taxes against any corporation, person, or association for property assessed by the State Board of Equalization, is *prima facie* evidence of the assessment, the property assessed, the delinquency, the amount of the taxes due and unpaid to the State and counties, or cities and counties therein named, and that the corporation, person, or association is indebted to the people of the State of California in the amount of taxes, State and county, and city and county, therein appeaing unpaid, and that all the forms

of law in relation to the assessment and levy of such taxes have been complied with. [In effect March 9, 1883.]"

SEC. 3671. "The assessment made by the County Assessor, and that of the State Board of Equalization, as apportioned by the Boards of Supervisors to each city, town, township, school, road, or other district in their respective counties, or cities and counties, shall be the only basis of taxation for the county, or any subdivision thereof, except incorporated cities and towns, and may also be taken as such basis in incorporated cities and towns when the proper authorities may so elect. All taxes upon townships, road, school, or other local districts shall be collected in the same manner as county taxes. [In effect March 9, 1883.]"

How Taxes are Collected upon all the Property in the State, except upon the Franchise, Roadway, Roadbed, Rails, and Rolling Stock of a Railroad Operated in more than one County.

"On or before the fourth Monday of October, the County Auditor must deliver a duplicate assessment book to the Tax Collector of the county." P. C. Sections 3732, 3733, and 3734.

"Within ten days after the receipt of the duplicate assessment book, the Tax Collector must publish a notice specifying:—

1. "That taxes will be delinquent on the last Monday in December next, thereafter, at six

o'clock P. M., and that unless paid prior thereto, five per cent will be added to the amount thereof.

2. "The time and place at which payment of taxes may be made." P. C., Sec. 3746.

"The notice in every case must be published for two weeks in some weekly or daily newspaper, published in the county, if there is one, or if there is not, then by posting it in three public places in each township." P. C., Sec. 3749.

"On the last Monday in December of each year, at six o'clock P. M., all unpaid taxes are delinquent, and thereafter the Tax Collector must collect for the use of the county, an addition of five per cent." P. C., Sec. 3756.

"On or before the first Monday in February, of each year, the Tax Collector in each of the counties other than San Francisco, and on or before the first Monday in March of each year, in the city and county of San Francisco, the Tax Collector of said city and county must publish the delinquent list, which must contain the names of the persons and a description of the property delinquent and the amount of taxes and costs due, opposite each name and description, with the taxes due on personal property added to taxes on real estate where the real estate is liable therefor, or the several taxes are due from the same person. The expense of the publication, to be a charge against the county." P. C. 3764.

"The Tax Collector must append and publish with the delinquent list, a notice that unless the taxes delinquent, together with the costs and percentage are paid, the real property upon

which such taxes are a lien, will be sold at public auction." P. C. 3765.

"The publication must be made once a week for three successive weeks, in some newspaper or supplement thereto, published in the county, and the publication must be contracted for with the lowest bidder; and, after ten days public notice that such will be let. The bidding must be by sealed proposals." * * * * * P. C. Sec. 3766.

"The publication must designate the time and place of sale." P. C. Sec. 3767.

"The time of sale must not be less than twenty-one, nor more than twenty-eight days from the first publication, and the place must be in front of the County Court House; or if in the City and County of San Francisco, in or in front of the Tax Collector's office for all State and county taxes, and for all other taxes in front of the Tax Collector's office in their respective towns, cities, and local districts." P. C. Sec. 3768.

"The Collector must collect in addition to the taxes due on the delinquent list and five per cent added thereto, fifty cents on each lot, piece, or tract of land separately assessed; and, on each assessment of personal property, one half of which must go to the county and the other to the Collector in full for preparing the list." P. C. Sec. 3770.

"On the day fixed for the sale, or on some subsequent day to which he may have postponed it, of which he must give notice, the Collector

between the hours of ten o'clock A. M., and three P. M., must commence the sale of the property advertised, commencing at the head of the list and continuing alphabetically or in the numerical order of lots and blocks until completed." P. C. Sec. 3771.

"After receiving the amount of the taxes and costs, the Collector must make out in duplicate, a certificate dated on the day of sale, stating (when known) the name of the person assessed, a description of the land sold, the amount paid therefor, that it was sold for taxes, giving the amount and year of the assessment, and specifying the time when the purchaser will be entitled to a deed." P. C. Sec. 3776.

"The certificate must be signed by the Collector and one copy delivered to the purchaser, and the other filed in the office of the County Recorder." P. C. Sec. 3777.

"A redemption of the property sold, may be made by the owner or any party in interest, within twelve months from the date of the purchase." P. C. Sec. 3780.

The Lien and Effect of a Tax.

"Every tax has the effect of a judgment against the person, and every lien created by this title, has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed,

until the taxes are paid, or the property sold for the payment thereof." P. C. 3716.

"Every tax due upon personal property, is a lien upon the real property of the owner thereof, from and after twelve o'clock M., of the first Monday in March, in each year." P. C. 3717.

"Every tax due upon real property is a lien against the property assessed, and every tax due upon improvements upon real estate assessed to others than the owner of the real estate, is a lien upon the land and improvements, which several liens attach as of the first Monday of March, in each year." P. C. 3718.

When Suits may be Commenced to Recover the Delinquent Taxes, upon all Property in the State, except upon Franchise, Roadway, Road-bed, Rails, and Rolling Stock of a Railroad Operated in more than one County.

P. C. 3899. "The Controller may, at any time after a delinquent list has been delivered to a collector, direct such collector not to proceed in the collection of any tax on said list, amounting to three hundred dollars, further than to offer for sale but once any property upon which such tax is a lien. Upon such direction, the collector, after offering the property for sale once, and there being no purchaser in good faith, must make out and deliver to the Controller a certified copy of the entries upon the delinquent list relative to such tax; and the Tax Collector, or the Con-

troller, in case the Tax Collector refuses or neglects for fifteen days after being directed to bring suit for collection by the Controller, may proceed, by civil action in the proper Court, and in the name of the people of the State of California, to collect such tax and costs."

Special and Local Legislation Prohibited by the State Constitution.

SECTION 25, of Article IV. "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

First—Regulating the jurisdiction and duties of Justices of the Peace, Police Judges, and of Constables.

Second—For the punishment of crimes and misdemeanors.

Third—Regulating the practice of Courts of Justice.

Fourth—Providing for changing the venue in civil or criminal actions.

Fifth—Granting divorces.

Sixth—Changing the names of persons or places.

Seventh—Authorizing the laying out, opening, altering, maintaining, or vacating roads, highways, streets, alleys, town plats, parks, cemeteries, graveyards, or public grounds not owned by the State.

Eighth—Summoning and impaneling grand and petit juries and providing for their compensation.

Ninth—Regulating county and township business or the election of county and township officers.

Tenth—For the assessment or collection of taxes.

Eleventh—Providing for conducting elections, or designating the places of voting, except on the organization of new counties.

Twelfth—Affecting the estates of deceased persons, minors, or other persons under legal disabilities.

Thirteenth—Extending the time for the collection of taxes.

Fourteenth—Giving effect to invalid deeds, wills, or other instruments.

Fifteenth—Refunding money paid into the State Treasury.

Sixteenth—Releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or person to this State, or to any municipal corporation therein.

Seventeenth—Declaring any person of age, or authorizing any minor to sell, lease, or encumber his or her property.

Eighteenth—Legalizing, except as against the State, the unauthorized or invalid act of any officer.

Nineteenth—Granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity.

Twentieth—Exempting property from taxation.

Twenty-first—Changing county seats.

Twenty-second—Restoring to citizenship persons convicted of infamous crimes.

Twenty-third—Regulating the rate of interest on money.

Twenty-fourth—Authorizing the creation, extension, or impairing of liens.

Twenty-fifth—Chartering or licensing ferries, bridges, or roads.

Twenty-Sixth—Remitting fines, penalties, or forfeitures.

Twenty-seventh—Providing for the management of common schools.

Twenty-eight—Creating offices, or prescribing the powers and duties of officers in counties, cities, cities and counties, townships, election or school districts.

Twenty-ninth—Affecting the fees or salary of any officer.

Thirtieth—Changing the law of descent or succession.

Thirty-first—Authorizing the adoption or legitimation of children.

Thirty-second—For limitation of civil or criminal actions.

Thirty-third—In all other cases where a general law can be made applicable."

Corporations can only be Formed or Changed under General Laws.

SEC. 1 OF ART. XII OF THE STATE CONSTITUTION—"Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

Special Privileges or Immunities not to be Granted.

SEC. 21, ART. I OF THE STATE CONSTITUTION—"No special privileges or immunities shall ever be granted which may not be altered, revoked or appealed by the Legislature, nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens."

Provisions of Constitution Mandatory or Prohibitory.

SEC. 22 OF ART. I OF THE STATE CONSTITUTION—"The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

Points and Authorities.

Having given copies of the provisions of the Political Code, and of the State Constitution, to which we desire to call attention, we will now attempt to show that the whole scheme for the collection of taxes upon the franchise, road-bed, roadway, rails, and rolling stock of railroads operated in more than one county, is in direct conflict with various provisions of the State Constitution and with the 14th Amendment to the Constitution of the United States.

I.

That sections 3668, 3669 and 3670 of the Political Code are in palpable contravention of Subdivision 10 of Section 25 of Article IV of the State Constitution in this, that they constitute a special law for the collection of taxes.

II.

That said Section 3668, 3669 and 3670 of the Political Code, are in palpable contravention of Subdivision 3 of Section 25 of Article IV of the State Constitution in this, that they constitute a special law regulating the practice of courts of justice in the collection of delinquent taxes upon the franchise, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one county.

III.

That by the provisions of said Political Code, immunities and privileges are conferred upon the owners of railroads operated in only one county, which are not conferred upon the owners of railroads operated in more than one county.

IV.

That burdens are, by said sections of the Political Code, imposed upon the owners of railroads operated in more than one county, which are not imposed upon the owners of railroads operated only in one county; and that such legislation is in direct conflict with Section one of Article XII of the State Constitution.

V.

That the provisions of Sections 3668, 3669 and 3670 of the Political Code, deprive the owners of railroads operated in more than one county of the equal protection of the laws; and hence are in conflict with the provisions of Section 1 of the 14th Amendment to the Constitution of the United States.

VI.

That the provisions of Sections 4 and 10 of Article XIII of the State Constitution, and the legislation under said sections for the assessment of the franchise, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one county, deprive the owners of said railroads of the equal protection of the laws—hence, they are in direct conflict with Section 1 of the 14th Amendment to the Constitution of the United States.

It will be observed that all the above points, save the last one, relate exclusively to the *collection* of taxes; the latter only referring to the assessment of railroad property. So far as I am advised, these questions as to the collection of these taxes, have never before been presented to, or passed upon by any court, except the Court below.

Is the Provision of the Code, before referred to, for the Collection of Taxes upon Railroad Property Operated in more than one County, a Special Law under the Constitution?

The taxes upon all the property in the State except upon the franchise, roadway, road-bed, rails, and rolling stock of railroads operated in more than one county and that upon property belonging to natural persons and corporations, including railroad corporations operating and owning a railroad in only one county, are collected by the Tax Collector of the county in which the property is situated; and ten days after the fourth Monday of October and after the receipt of the duplicate assessment book, said officer publishes in a newspaper published in the county, notice that the taxes will be delinquent on the last Monday in December at 6 o'clock P. M., and the time and place within the county at which payment of the taxes may be made. Should any taxes become delinquent, it is then made the duty of the Tax Collector after adding five per cent penalty, to make out the delinquent list, and on or before the first Monday in February to publish said delinquent list, which must contain the names of the persons and a description of the property delinquent, and the amount of taxes and costs due, opposite each name and description; and he must append and publish with said delinquent list a notice, that unless the taxes delinquent, together with the costs and percentage, are paid, the property upon which such

taxes are a lien will be sold at a time not less than twenty-one, nor more than twenty-eight days from the first publication, in front of the County Court House. That such notice must be published once a week for three successive weeks, in some newspaper or supplement published in the county. The owner of the property may at any time before sale, pay the taxes due on the delinquent list, with the five per cent penalty, together with fifty cents on each parcel of land separately assessed, and upon each assessment of personal property. Should the tax amount to three hundred dollars or more and remain unpaid, the State Controller may, in his discretion, direct the Tax Collector to offer the property for sale but once, and in case no bidders are found, then suit may be brought in the name of the State to collect such tax and costs. In case, however, no such order by the Controller is made and the property is sold, the owner then has twelve months within which to redeem the property. But, when we come to the collection of the tax upon the franchise, roadway, road-bed, rails and rolling stock of the few railroads operated in more than one county, we have the special and onerous conditions imposed by sections 3668, 3669 and 3670 of the Political Code; the Controller of State must publish a notice for two weeks *not in a newspaper published in a county in which any portion of the railroad may be situate*, but in one daily newspaper at the State Capital and in two daily newspapers published in the City of San Francisco; that he has received from the

State Board of Equalization the "duplicate record of assessments of railways," and the "duplicate record of apportionment of railway assessments;" and that the taxes are now payable and will be delinquent on the last Monday in December at 6 o'clock P. M., and that unless PAID TO THE STATE TREASURER AT THE CAPITOL, prior thereto, five per cent will be added to the amount thereof. Notwithstanding the notice, the corporation, person, or association assessed cannot pay over the taxes to the State Treasurer without an order from the Controller. If the taxes become delinquent no notice of the delinquency is published and if they remain unpaid until after the first Monday of February, the Controller must then commence an action for the recovery of said taxes due to the State, and also any taxes that may be due the various counties, and cities and counties, and an attachment may issue without oath or bond, and any and all property belonging to the delinquent and which is, or not subject to any tax lien, is liable to be seized to satisfy said delinquent tax; and, in case the tax should be paid before judgment or after judgment, he is compelled to pay such counsel fees as the Court may allow; but should the property be sold under execution, he has only six months instead of twelve within which to redeem the same. In ex parte Westerfield, 55 Cal., 550, this Honorable Court in Bank held that an act to regulate and provide a day of rest in certain cases, which provided that it should be unlawful for any person engaged in the busi-

ness of baking to engage or permit others in his employ, to engage in the labor of baking for the purposes of sale between the hours of 6 o'clock P. M. on Saturday and 6 o'clock P. M. on Sunday, was a special law within the meaning of those terms as employed in section 25 article IV of the present Constitution. It was further held, that if there was authority to restrain labor on some one day, it must be, if at all, under a general law restraining all labor on that day. A large class of persons were affected by this legislation, and the act applied to all persons of that class, while the legislation now in question affects but a few railroad corporations, but does not affect all railroad corporations—in other words, it does not affect any railroad operated in only one county. If the Baker's Act, so called, is a special law, then *a fortiori* is that portion of the Political Code a special law.

This Honorable Court in Bank, held in the case of Earle *vs.* The Board of Education of San Francisco, 55 Cal., 489, that a new section added to the Political Code which established the salaries to be paid to teachers in the public schools in all consolidated cities and counties containing more than one hundred thousand inhabitants, violated Section 25, Article IV of the Constitution, and was null and void.

"A special Act cannot be converted into a general act by a declaration of the Legislature in another statute, that it shall be so considered." San Francisco *vs.* S. V. W. W., 48 Cal., 493.

In the case of the Dundee Mortgage Trust Investment Company *vs.* School District No. 1, of Multnomah County, *et al.*, in the Circuit Court of Oregon, reported in Second West Coast Reporter, p. 241, upon an application for a provisional injunction to restrain defendants from selling and disposing of sundry notes and mortgages belonging to the plaintiff for the non-payment of taxes levied thereon, under the provision of an act of the Legislature of the State of Oregon, Deady, Judge, ordered that the writ be issued as prayed for. The act in question provided for the taxation of mortgages upon real property situate in no more than one county, and declared that all mortgages "hereafter executed whereby land situate in more than one county in this State is made security for the payment of a debt, shall be void."

In rendering the opinion, the Court said, (see pages 250, 251): "The Constitution of the State, Article 4, Section 23, subdivision 10, also prohibits the passage of 'special or local laws' for the assessment and collection of taxes for State, county, township, or road purposes."

"In *Manning* vs. *Klippel*, 9 Or., 367, it was held that an act providing for the compensation of the sheriffs and clerks of fourteen out of the twenty-three counties of the State was a 'local' law for the assessment and collection of taxes for county purposes, and therefore within this prohibition and void.

"The terms 'special' and 'local' are not

always convertible, though the former may include the latter. A special act is one that comes short of being general. The latter comprehends the genus, while the former is confined to the species. In Holland's case, 4 Co. 76 a, cited in Smith's Commentaries, Section 798, it is said, by way of illustration: 'Spirituality is *genus*; bishopric, deanery, etc., are *species*;' and the author adds: 'Hence acts which concern the whole spirituality in general are general acts * * * * * A statute concerning leases made by bishops is a special act, because it concerns the bishops only, who are but a species of the spirituality.'

"An act providing for the assessment of mortgages generally is, so far, a general act. It comprehends the genus. But an act providing for the assessment of all mortgages for sums exceeding five hundred dollars, or not payable within one year from the date of their execution, is special. It comprehends only a species of mortgages. So an act providing for the assessment of mortgages on wood-lands, plow-lands, or river-lands is special; and in my judgment, an act that taxes mortgages on land in no more than one county, to the exclusion of those on land in more than one, is in the same category. It does not comprehend the genus, mortgages, but only the species—one county mortgages. Without imputing to the legislature that passed this act any other purpose, in making this discrimination between one and two county mortgages, than a desire to avoid the supposed inconvenience of

applying it to the latter, it is well to remember that special legislation in the imposition of taxes is sure, if unrestrained, to run into partiality, oppression, and injustice. To prevent this evil, this inhibition against special legislation was placed in the constitution."

Subsequently this case was heard upon demurrer. The opinion of the Court was reported in 3d West Coast Rep., p. 606 Among other things the Court said: "On March 6, 1884, the injunction was allowed upon the ground that the act aforesaid, under which the plaintiff's mortgages were assessed, was void for want of the unifomity required by Section one of Article IX of the Constitution, and because it was passed contrary to Section 23 of Article IV of the Constitution, which forbids the passage of a special act for the ssessment and collection of taxes." Again on page 612, the Court said: "But passing the question of uniformity, this act is clearly void, because it was passed in violation of Section 23 of Article IV of the Constitution, which expressly forbids the passage of a 'special or local' law 'for the assessment and collection of taxes.' It is not necessary to add to what was said on this subject in the former opinion, as the brief only refers to *Allen* vs. *Hirsch*, 8 Or., 412, which I regard as overruled by *Manning* vs. *Klippel*, 9 Or., 367, so far as it decides that a public statute cannot be a 'special or local' one within the meaning of Section 23 of Article IV, of the Constitution of the State.

"A 'special' act relates to a part and not the whole—as one county mortgages and not all mortgages. And whether it is also considered a 'public' or 'private' one, is altogether immaterial and irrelevant. Under the constitution of this State all statutes are 'public' ones, unless otherwise declared in the body of the act." Art. IX, Sec. 37, Or. Con.

"If an act is not a 'special' one because it is also a 'public' one—that is, an act of which courts take judicial notice,—then every prohibition contained in the constitution against special legislation may be violated with impunity.

"According to this idea, if the law is 'public' it is not special. But the constitution makes it public, however special in its nature or operation, unless the legislature otherwise declares. So, as there can be no special law, according to this theory, unless the legislature declares it is private, it is not likely that when it undertakes to pass an act upon subjects forbidden to special legislation, it will take the trouble to declare it private and thus subject it to the risk of being declared unconstitutional."

"But, undoubtedly, under the constitution of the State, an act may be both 'public' and 'special or local' and the presence of one of these qualities in no way implies or excludes the other. An act cannot be both 'public' and 'private' but it can be either and be special."

II.

Section 3670 of the Political Code is Void, because the same is a Special Law Regulaling the Practice of Courts of Justice in Actions brought to Recover Delinquent Taxes upon the Franchise, Roadway, Road-bed, Rails, and Rolling Stock of Railroads Operated in more than one County.

The Code of Civil Procedure furnishes a complete system of practice in all civil actions. Section 421, C. C. P., declares that,—"*The forms of pleading in civil actions and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this code.*"

Section 426 C. C. P., declares what is a sufficient complaint as follows: "The complaint must contain,

First.—The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action.

Second.—A statement of the facts constituting the cause of action, in ordinary and concise language.

Third.—A demand of the relief which the plaintiff claims.

"If the recovery of money or damages be demanded the amount thereof must be stated."

When Causes of Action may be United.

SECTION 427, C. C. P. "The plaintiff may unite several causes of action in the same complaint, where they all arise out of—

1st. Contracts, express or implied.

2nd. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same.

3rd. Claims to recover specific personal property, with or without damage for the withholding thereof.

4th. Claims against a trustee by virtue of a contract or by operation of law.

5th. Injuries to character.

6th. Injuries to person.

7th. Injuries to property.

The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person."

When and How a Defendant may Demurr.

SECTION 430, C. C. P. "The defendant may demur to the complaint within the time required in the summons to answer when it appears upon the face thereof, either—

1st. That the Court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2nd. That the plaintiff has no legal capacity to sue; or,

3rd. That there is another action pending between the same parties for the same cause; or,

4th. That there is a defect or misjoinder of parties, plaintiff or defendant; or,

5th. That several causes of action have been improperly united; or,

6th. That the complaint does not state facts sufficient to constitute a cause of action; or,

7th. That the complaint is ambiguous, unintelligible, or uncertain."

SECTION 433, C. C. P. "When any of the matters enumerated in Section 430 do not appear upon the face of the complaint, the objection may be taken by answer."

SECTION 434, C. C. P. "If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

Objections to a complaint, on the ground that it does not state facts sufficient to constitute a cause of action and on the ground that the Court has not jurisdiction, may be made at any time. These objections may be made for the first time in the Supreme Court. *Haskell* vs. *Moore, et al.*, 29 Cal. Rep., 437. *Rogers* vs. *Shannon*, 52 Cal., 99.

Instead of allowing the Court to determine the sufficiency of the complaint under the forms and rules prescribed by the Code of Civil Procedure, the legislature usurping the powers and prerogatives of the Court, in Section 3670 of the Political Code, therein and thereby adjudged, that the form used in these actions is sufficient. Said Section 3670 P. C., makes a complaint sufficient, that would be wholly insufficient under Section 426, C. C. P., in this—that no statement of the facts constituting the cause of action, is made or attempted, but simply two preliminary facts to wit: An assessment against the defendant by the State Board of Equalization, and an apportionment of said assessment. There is no statement that the defendant is the owner of the franchise, roadway, road-bed, rails and rolling stock of any railroad operated in more than one county, or in any of the counties to which such apportionment was made; neither is there any averment that any State tax was levied upon said property; nor is there any averment that either of said counties named levied any county tax upon said property; neither is there any averment that the State Board of Equalization ever determined the rate of the State tax to be levied and collected upon said property; neither is there any averment that the Board of Supervisors of any of said counties, fixed the rate of the county tax to be levied and collected upon said property. In a word, the form of complaint given in said section, would be held insufficient under any known sys-

tem of pleadings, on the ground that it does not state facts sufficient to constitute a cause of action. Said complaint is a palpable violation of Section 427, C. C. P., in this—that eighteen different causes of action, to wit: One for State taxes, and seventeen for that number of county taxes, are united in one action in a single count, without being separately stated. Tested by the Code, these complaints would fall of their own weight; and, had it not been for the form prescribed in Section 3670, P. C., counsel would never have dreamed of filing such a complaint.

The case of *Whiting* vs. *Townsend*, 57 Cal., 515, is not an authority in this case, for the reason that the law prescribing the form of complaint in action to recover certain street assessments, was passed in 1872, and the cause of action arose and suit had been commenced prior to the adoption of the present constitution.

Neither is the case of the *City of Stockton* vs. *The Western Fire and Marine Insurance Co., et al.*, decided in October last, an authority in this case—that was an action instituted by the city to recover certain delinquent taxes. The form of the complaint was one prescribed by a section of the charter of said city which was passed prior to the adoption of the present constitution, to-wit, 1872, which charter has remained in force up to the present time, not having been altered or amended, and there having been no re-organization of the municipal corporation under the present constitution.

The sections of the Code under discussion, were passed under the new constitution, and went into effect March 9, 1883.

A question similar to that now in discussion, arose in the case of the *Madison and Indianapolis R. R. Co.* vs. *Whitteneck*, reported in 8th Ind. Reports, p. 217. The legislature of Indiana passed an act entitled, "An act to provide compensation to the owners of animals killed or injured by the cars, locomotives, or other carriages of any railroad company in this State. Approved March 1, 1853.

"SECTION 1. *Be it enacted by the general assembly of the State of Indiana*, that whenever any animal or animals shall be killed or injured by the cars, or locomotives, or other carriages used on any railroad in this State, the owner thereof may go before some justice of the peace of the county in which such injury occurred, and file his complaint in writing, and such justice shall fix a day to hear said complaint, and shall cause at least ten days' notice to be served on the railroad company defendant, by service of summons by copy on any conductor of any train passing said county.

"SECTION 2. On the hearing of said cause, the justice or jury trying the same shall give judgment for the plaintiff for the value of the animal destroyed or injury inflicted without regard to the question whether such injury or destruction, was the result of willful misconduct or negligence, or the result of unavoidable accident.

"SECTION 3. If the defendant shall appeal from such judgment, and shall not reduce the damages assessed twenty per cent, the appellate Court shall give judgment for double the amount of damages assessed in such appellate Court, and a docket fee of five dollars.

"SECTION 4. This act shall not apply to any railroad securely fenced in, and such fence properly maintained by such company."

Suit was commenced under this law before a Justice of the Peace, to recover the value of a heifer killed by a locomotive of defendant. Plaintiff obtained judgment before the Justice, whereupon the defendant appealed to the Common Pleas; in that court, the defendant not appearing, judgment was rendered for plaintiff without the intervention of a jury, for double the amount of the judgment before the justice. After discussing the case at considerable length the Court said:

"4. The third section, so far as it inflicts a penalty for appealing and failing to reduce the judgment 20 per cent is, in our opinion, unconstitutional and void.

"A law may be constitutional in part and unconstitutional in part. *The third section relates to the practice of the law in these cases.* The trial and rendition of judgment are a part of the practice in a cause. *The section is special.* Laws are general or special. This is the first great division. Special laws are again divided into local, personal, particular, &c. See Smith's

Com., p. 419. A special act concerns 'the particular interest or benefit of certain individuals, or of particular classes of men.' See 1 Kent, 459. A law may be 'partly public and partly private.' The principle of this act is entirely different from the principle of those general laws fixing the jurisdiction of the several courts. The jurisdiction of the court of the Justice of the Peace is limited by them in respect to amount. But within that limit it operates alike upon all. So as to that of the Common Pleas and of the Supreme Court. There may, however, be unconstitutional sections in those acts. As to this we are not now called upon to speak.

"The section, then, under consideration, being special, and upon the practice of the law, is prohibited by that clause of section 22, article IV, of the Constitution which provides that no such act shall be passed, 'regulating the practice in courts of justice.'

"5. The first section of the act is also void so far as it gives, as to amount, unlimited jurisdiction to Justices of the Peace. In that particular it is special, and in conflict with that clause of the section of the Constitution just cited which prohibits special laws, 'regulating the jurisdiction and duties of Justices of the Peace and constables.'"

Section 3670 of the Political Code contains several other equally obnoxious special provisions, to wit:

1. The issuing of an attachment without affidavit or bonds.

2. The recovery of counsel fees in such an amount as the Court may determine to be reasonable and just.

The Code of Civil Procedure, section 538, before an attachment can issue, requires an affidavit to be made by or on behalf of plaintiff; showing,

"1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter claims) upon a contract, expressed or implied, for the direct payment of money, and that such contract was made or is payable in this State, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff or the person to whom the security was given, become valueless;" * * * *. Said Section 3670, of the Political Code, not only provides for an attachment without any affidavit or bond, but in an action that is not upon a contract, either express or implied, for the direct payment of money; and also requires such attachment, where the taxes are a lien upon the property assessed.

Section 539, C. C. P., provides, that before issuing the writ of attachment, the clerk must require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, and not exceeding the amount claimed

by the plaintiff, with sufficient sureties, to the the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. If under the provisions of this mandatory and prohibitory constitution, with a Code of Civil Procedure in terms applicable to all civil actions, which expressly declares that all pleadings shall be judged by the rules and regulations of said code, and which requires that the complaint shall contain a statement of the facts constituting the cause of action, and that where several causes of action are united they must affect all the parties to the action and must be separately stated; and which declares that an attachment can only be issued upon affidavit, which must show that the defendant is indebted upon a contract express or implied for the direct payment of money—if this Honorable Court shall determine in these actions that the legislature and not the court may pass upon the sufficiency of the pleadings, and that all the rules and regulations of the code as to the sufficiency of such pleadings can be set aside in certain cases, and that an attachment may issue in such cases where the same could not be issued under the provisions of the general law of procedure, and that counsel fees may be awarded in such actions which are not allowed in any other action—we respectfully reiterate, that if these actions can be sustained under the provisions of

the constitution prohibiting special legislation, then is Section 25 of Article IV of the State Constitution but a worthless prohibition; as the legislature may from time to time emasculate and destroy by a series of special acts, the entire system of the Code of Civil Procedure, and the revenue laws of the State.

Special legislation in this State, prior to the adoption of the Constitution of 1879, had become a great and crying evil--we had no such thing as a revenue law, civil practice act, or criminal practice act applicable to the whole State—Grand Juries in different portions of the State, consisted of different numbers as low as fifteen, in other places eighteen, and in yet others twenty-three constituted a Grand Jury. In San Francisco in civil cases the prevailing party in civil actions was allowed five per cent percentage upon the amount recovered in any civil action to the extent of $100, which was not allowed in any other portion of the State.

Most of the time of the legislature was occupied in the passage of local and special bills. These measures were far more costly than the cost of general laws—indeed, there was scarcely such a thing as a general law. The statutes were swelled to enormous proportions containing as high as —— pages per volume. There was a general feeling of insecurity among the people, and it was determined that at least the practice of the courts in both civil and criminal actions, and the collection of revenue throughout the State, should be uniform; that if there were

any laws of a general nature, these and others not necessary to name, should operate with uniformity throughout the length and breadth of the State.

III.

The Political Code Grants Privileges and Immunities to the owners of the Franchise, Roadway, Road-bed, Rails and Rolling Stock of Railroads Operated in one County, and to Other Tax-payers, Which are Not Granted to the Owners of the Franchise, Roadway, Road-bed, Rails and Rolling Stock of Railroads Operated in More than one County, and is Therefore Obnoxious to the Provisions of Section 21, of Art. I, of the State Constitution.

The State Constitution is in no manner responsible for the inequalities of the Political Code in reference to the collection of taxes. That instrument simply provided for the assessment of the franchise, roadway, road-bed, rails and rolling stock of railroads operated in more than one county, and the apportionment of such assessment to the various counties in which the road was operated. There is not the slightest word or phrase to indicate that it was the intention of the framers of the Constitution that the tax should be collected by officers other than the tax collectors of the various counties; on the contrary, from the language of the Constitution, it would seem that the taxes levied upon the property so assessed should be collected in the same manner and by the same officers as the other taxes of the State.

We have already had occasion to refer to the burdens imposed upon the owners of railroads operated in more than one county, and we shall have occasion to refer to them again when discussing the 14th amendment to the Constitution of the United States, and yet, in order to make our present point clear, it is necessary to refer to them in this connection, but in a very brief manner.

Whenever the tax upon any property other than railroad property operated in more than one county, becomes delinquent, the owner is notified of such delinquency and its amount, as well as the amount of costs which have attached, by a notice published in a newspaper published in the county in which the property is situate; and he may pay the tax in that county, and the property must first be offered for sale before any suit can be brought to recover the tax. At any time before sale he may satisfy the lien by paying the tax, five per cent penalty and fifty cents for each lot or piece of property advertised as delinquent. If the Controller so directs, the property may be offered but once for sale, and if no bidders be found, suit may be commenced; but, if the property is sold, he has twelve months within which to redeem the same, and one month after written notice to him that an application will be made for a deed on a given day. The owners of railroads operated in more than one county are deprived of all these privileges and immunities. They cannot pay the taxes to the tax-collector of the county, but must go to the

trouble and expense of going to the State Capitol; and, as the tax is payable in gold or silver coin, they must bear the risk of its transportation to the Capitol, and after getting an order from the Controller, pay over the tax to the State Treasurer. Should the tax become delinquent on their property, they are in no manner notified of such delinqueney, except by the service of a copy complaint and summons, in an action brought to recover said tax, and the appearance of the sheriff with a writ of attachment to attach any and all of their property for said tax. If they desire to settle the suit before judgment they must pay such counsel fees as the Court may allow; and, if judgment be entered against them, such counsel fees as may be allowed by the Court form a part of said judgment, and if their property be sold under an execution they have but six months within which to redeem.

The Board of Supervisors of the County of Lassen attempted to collect a tax under the guise of a license, of 2½ cents per head for each sheep pastured in said county, where the State and county taxes on said sheep were paid in another county. One of the provisions of the ordinance was, that the tax was not to be paid by those who listed their sheep as taxable property in that county, and paid taxes on them as such. In the case of *Lassen County* vs. *Cone*, decided May 31, 1887, it was held by the Commissioners, and by Department one of said Court, that the ordinance was unconstitutional

and void in this, that it was violative of Section 21 of Article I of the State Constitution.

IV.

That said Sections 3668, 3669 and 3670 of the Political Code, Impose Burdens Upon the Owners of Railroads Operated in More than One County, Which are not Imposed Upon the Owners of Railroads Operated in Only One County; and, that such Legislation is in Direct Conflict with Section One of Art. XII of the State Constitution.

All the State taxes collected in the State, except those upon the franchise, roadway, roadbed, rails, and rolling-stock of railroads operated in more than one county, are by law, taken by the Treasurer of the respective counties to the State Capitol, and there paid into the State Treasury. The County Treasurer is allowed certain commissions upon the moneys transferred, and is allowed 40 cents per mile from the county seat to the Capitol, as mileage—such mileage not to exceed at any settlement, one hundred dollars. Said sections of the Code seek to compel the owners of railroads operated in more than one county to transport to the State Capitol, not only the State tax, but the county taxes, at their own cost and risk, and without any allowance for commissions ~~on~~ mileage—while the owners of railroads operated in only one county may pay

over their taxes in the county in which their roads are situate, without any costs or risks whatsoever.

What right has the State to impose upon the owners of railroads operated in more than one county, the cost and risk of transportation; should the moneys be lost in transit by inevitable accident, by the act of God or by train robbers, it would be no excuse for not paying the taxes over to the State Treasurer; the tax would still be due, although the money intended to pay the same had been thus lost. The aggregate of the taxes claimed on these five actions, amounts to about $650,000, as these taxes must be paid in gold or silver coin, the cost of transportation would amount to no small sum—were the amount paid in gold coin alone, its weight would exceed a ton and a half; were it paid in silver alone, its weight would amount to over twenty tons; were it paid, one half in gold and one half in silver, its weight would amount to about eleven tons. It would be necessary to hire teams and armed guards to transport it from the railroad offices or banks to the cars. In these days of train wrecking for plunder and train robberies, it would be necessary to have an armed guard upon the train to protect it from depredations.

Upon arriving at Sacramento, it would be necessary to hire other teams to haul the treasure from the railroad to the office of the State Treasurer. Again we inquire, what right has the State to impose these onerous and expensive duties upon the owners of railroads operated in

more than one county when they are not imposed upon the owners of railroads operated in only one county? What right has the State to commence suit by attachment without advertising the property as delinquent, and offering it for sale? What right has the State to impose upon the owners of railroads operated in more than one county, counsel fees for bringing the action, and reduce the time for redemption (should the property be sold) from one year to six months, when none of these things can be done, or imposed upon the owners of railroads operated in only one county.

In accordance with the constitution, all railroad corporations in this State are formed under the same general law; and any attempt to confer a benefit, or impose a duty upon one or more railroad corporations which is not conferred or imposed upon all railroad corporations, is null and void, being in conflict with Section I of Article XII of the State Constitution. The legislature has attempted in some cases to confer benefits upon certain corporations—in other cases it has attempted to impose obligations upon certain corporations, which were not conferred or imposed upon all corporations of the same class; and this Honorable Court with a single exception, has steadily upheld the doctrine here contented for, and the exceptional case has been steadily overruled; and such cogent reasons given therefor, that no man at the bar would now dare attempt to support the ruling in the case of

the *State Telegraph Company* vs. *Alta Telegraph Company*.

In the case of *San Francisco* vs. *S. V. W. W.*, reported in 48 Cal., p. 493, Mr. Justice Crockett then said: "After a careful examination of that case, I am satisfied it cannot be sustained either on reason or authority." Mr. Justice Crockett further said in speaking of corporations: "They can only be formed under general laws, and can exercise no powers, except such as are derived from general laws. * * * * The general laws under which they were formed and such others as shall afterwards be enacted, must alone define their rights and powers. *On this theory all private corporations formed for similar purposes, will stand upon the same footing, enjoy the same rights, and be subject to the same burdens, which cannot be increased or diminished, except by general laws applicable to all.*"

Mr. Justice McKinstry in the same case said: "The legislature could neither confer a benefit nor impose an obligation on the Spring Valley Water Works, not conferred or imposed on all water companies by the general law. To confer a special benefit or impose a special obligation, would be equally destructive of the uniformity which it is the object of Section 31, Article IV, to secure." Again he said: "*The rights and duties of all corporations formed under the general law providing for the incorporation of water companies, are fixed and determined by its terms, and can only be changed or modified by amend-*

ment of the general law. And every such amendment must be made applicable to all corporations created under the general law."

The same doctrine was adhered to and laid down in the case of the *Waterloo Turnpike Road Company* vs. *Cole*, 51 Cal., 381 ; and in the case of the *Spring Valley Water Company* vs. *Bryant*, 52 Cal., 132. In the case of the *Omnibus Railroad Company* vs. *Baldwin*, 57 Cal., 160, Mr. Justice McKinstry in a concurring opinion said :

" Section 31 of Article IV, of the former Constitution of the State, reads : 'Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.' This section has been judicially construed by the Supreme Court of the State in *The City and County of San Francisco* vs. *The Spring Valley Water Works*, 48 Cal., 493, and *Waterloo Turnpike Company* vs. *Cole*, 51 Id., 381. By reason of the section of the Constitution above recited, the legislature of California has no power by special act to confer upon a corporation formed or to be formed under the general laws corporate powers not acquired by all like corporations under the general laws. I do not propose to fortify the reasoning of Mr. Justice Crockett, in *San Francisco* vs. *Spring Valley Water Works.* In itself, eminently satisfactory, it accords with established canons of constitutional and statutory construction. My

purpose is simply to show that, to the extent above intimated, the construction of the provision of the Constitution has been 'settled' by the highest tribunal of the State."

"The same justice ~~for the~~ said corporations may be ~~found~~ *formed only* under the general laws, but they are not formed nor created directly *by* the general laws. They are formed by individuals under the general law; and when, in a particular instance, the corporate character is assumed, it is assumed with the same powers, privileges and liabilities as are possessed by and imposed upon all other like corporations formed by other individuals under the same general law. Corporations formed under the general laws do not exist anterior to the acquisition of the power to hold property, or any other corporate power. They come into existence panoplied. There can be no instance of the formation of a corporation under a general law which differs as to its corporate powers, or its liberty to employ them, from other corporations formed under the same general law; and there can be no creation, by special act, of a corporation which might or might not have been formed under the general laws."

The construction of this clause of the Constitution having been judicially settled by the cases just cited, respondents refrain from citing similar authorities from other States, believing it would be a work supererogation.

V.

That the Provisions of Sections 3668, 3669 and 3670 of the Political Code, deprive the Owners of Railroads Operated in more than one County of the Equal Protection of the Laws, and hence, are in Conflict with the Provisions of Section 1 of the 14th Amendment to the Constitution of the United States.

Will it be claimed or pretended that the owners of railroads operated in more than one county enjoy the equal protection of the laws? Does not the State deny them that protection in a most marked and oppressive manner? Not because they operate railroads, but because they operate them in more than one county—as well might the State compel all men six feet in height or all persons, natural or artificial, who own property in more than one county, to pay their taxes to the Treasurer at the State Capitol, while all other persons natural and artificial may pay theirs in the county in which the property is situated—as well might the State refrain from publishing the delinquent list with the amount of such delinquency for such persons, and authorize a suit by attachment directed against their property without first offering their property for sale and compelling them to pay counsel fees for the commencement and conduct of such suits, and limiting the time for the redemption of their property in case of sale under such judgment, to one-half the time allowed to all other tax-payers. The owners of railroads operated in more than

one county, enjoy the equal protection of the laws, with a vengeance. They are subjected to the onerous provisions of Sections 3668, 3669, and 3670 of the Political Code, not because they are corporations owning and operating property, and doing business in more than one county, for there are any number of corporations, such as water companies, turnpike companies, mining companies, express companies, telegraph companies, telephone companies, and other companies which own property in various counties in the State, and carry on and operate their business in said counties; and yet, none of these onerous duties are imposed upon them or any of them. It is not because the owners of railroads operated in more than one county are railroad corporations, because there are about the same number of railroad corporations which are operated in only one county, upon which none of these duties have been imposed.

VI.

That the Provisions of Sections 4 and 10 of Article XIII, of the State Constitution, and the Legislation under said Sections for the Assessment of the Franchise, Roadway, Road-bed, Rails, and Rolling Stock of Railroads operated in more than one County, deprive the Owners of said Railroads of the Equal Protection of the law—hence, they are in Direct Conflict with Section I of the 14th Amendment to the Constitution of the United States.

As this point is to be elaborated by other

counsel, I shall make no argument thereon at this time.

HARVEY S. BROWN,
Attorney for Respondents.

127-1

JAN 21 1888
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

CALIFORNIA RAILROAD TAX CASES.

PORTIONS OF CONSTITUTION AND LAWS OF THE STATE OF CALIFORNIA INVOLVED.

PREPARED BY DEFENDANTS IN ERROR.

Judd & Detweiler, Printers.

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PREPARED BY DEFENDANTS IN ERROR.

CONSTITUTION.

REVENUE AND TAXATION.

ARTICLE XIII.

SECTION 1. All property in the State not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law. The word "property," as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; *Provided*, That growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or

Taxation to be in proportion to value.

trust deed, for a deduction from credits of debts due to *bona fide* residents of this State.

Land and improvements to be separately assessed.

SEC. 2. Land, and the improvements thereon, shall be separately assessed. Cultivated and uncultivated land of the same quality and similarly situated shall be assessed at the same value.

Sectionized and unsectionized land, how assessed.

SEC. 3. Every tract of land containing more than six hundred and forty acres, and which has been sectionized by the United States Government, shall be assessed, for the purposes of taxation, by sections or fractions of sections. The Legislature shall provide by law for the assessment, in small tracts, of all lands not sectionized by the United States Government.

Securities, taxable.

SEC. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. EXCEPT AS TO RAILROAD AND OTHER QUASI PUBLIC CORPORATIONS, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof: *Provided*, That if any such security or indebtedness shall be paid by any such debtor or debtors, after assess-

ment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year.

Contract of borrower to pay tax on loan void.

SEC. 5. Every contract hereafter made by which a debtor is obligated to pay any tax or assessment on money loaned or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void.

Power of taxation cannot be surrendered.

SEC. 6. The power of taxation shall never be surrendered or suspended by any grant or contract to which the State shall be a party.

Payment of taxes by installments.

SEC. 7. The legislature shall have the power to provide by law for the payment of all taxes on real property by instalments.

Annual statement of property to be given.

SEC. 8. Legislature shall by law require each taxpayer in this State to make and deliver to the county assessor, annually, a statement under oath setting forth specifically all the real and personal property owned by such taxpayer, or in his possession or under his control, at twelve o'clock meridian, on the first Monday of March.

State Board of Equalization.

SEC. 9. A State Board of Equalization, consisting of one member from each congressional district in this State, shall be elected by the qualified electors of their respective districts at the general election to be held in the year one thousand eight hundred and seventy-nine, whose term of office after those first elected shall be four years, whose duty it shall be to equalize the valuation of the taxable property of the several counties in the State for the purposes of taxation. The Controller of State shall be *ex officio* a member of the Board. The Boards of Supervisors of the several counties of the State shall constitute Boards of Equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property

in the county for the purpose of taxation; *Provided*, Such State and County Boards of Equalization are hereby authorized and empowered, under such rules of notice as the County Boards may prescribe as to the county assessments and under such rules of notice as the State Board may prescribe as to the action of the State Board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll and make the assessment conform to the true value in money of the property contained in said roll.

Property, where assessed.

SEC. 10. ALL PROPERTY, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway road-bed, rails and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts.

Income tax.

SEC. 11. Income taxes may be assessed to and collected from persons, corporations, joint-stock associations, or companies resident or doing business in this State, or any one or more of them, in such cases and amounts and in such manner as shall be prescribed by law.

Poll tax.

SEC. 12. The Legislature shall provide for the levy and collection of an annual poll tax of not less than two dollars on every male inhabitant of this State over twenty-one and under sixty years of age, except paupers, idiots, insane persons, and Indians not taxed.

Said tax shall be paid into the State School Fund.

SEC. 13. The Legislature shall pass all laws necessary to carry out the provisions of this article. Laws to be passed by Legislature.

ARTICLE XII.

SEC. 1. Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section may be altered from time to time or repealed. Corporations to be formed under general laws.

ARTICLE IV.

SECTION 25. The Legislature shall not pass local or special laws in any of the following enumerated cases—that is to say: Local and special laws prohibited.

First. Regulating the jurisdiction and duties of justices of the peace, police judges, and of constables.

Second. For the punishment of crimes and misdemeanors.

Third. REGULATING THE PRACTICE OF COURTS OF JUSTICE.

Fourth. Providing for changing the venue in civil or criminal actions.

Fifth. Granting divorces.

Sixth. Changing the names of persons or places.

Seventh. Authorizing the laying out, opening, altering, maintaining, or vacating roads, highways, streets, alleys, town plats, parks, cemeteries, graveyards, or public grounds not owned by the State.

Eighth. Summoning and impaneling grand and petit juries and providing for their compensation.

Ninth. Regulating county and township business, or the election of county and township officers.

Tenth. FOR THE ASSESSMENT OR COLLECTION OF TAXES.

Eleventh. Providing for conducting elections or designating the places of voting, except on the organization of new counties.

Twelfth. Affecting the estates of deceased persons, minors, or other persons under legal disabilities.

Thirteenth. Extending the time for the collection of taxes.

Fourteenth. Giving effect to invalid deeds, wills, or other instruments.

Fifteenth. Refunding money paid into the State treasury.

Sixteenth. Releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or person to this State or to any municipal corporation therein.

Seventeenth. Declaring any person of age, or authorizing any minor to sell, lease, or encumber his or her property.

Eighteenth. Legalizing, except as against the State, the unauthorized or invalid act of any officer.

Nineteenth. Granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity.

Twentieth. Exempting property from taxation.

Twenty-first. Changing county seats.

Twenty-second. Restoring to citizenship persons convicted of infamous crimes.

Twenty-third. Regulating the rate of interest on money.

Twenty-fourth. Authorizing the creation, extension, or impairing of liens.

Twenty-fifth. Chartering or licensing ferries, bridges, or roads.

Twenty-sixth. Remitting fines, penalties, or forfeitures.

Twenty-seventh. Providing for the management of common schools.

Twenty-eighth. Creating offices or prescribing the powers and duties of officers in coun-

ties, cities, cities and counties, townships, election or school districts.

Twenty-ninth. Affecting the fees of salary of any officer.

Thirtieth. Changing the law of descent or succession.

Thirty-first. Authorizing the adoption or legitimation of children.

Thirty-second. For limitation of civil or criminal actions.

Thirty-third. In all other cases where a general law can be made applicable.

POLITICAL CODE.

ASSESSMENT OF PROPERTY.

Section 3627.

Property, how assessed. Taxes to.

ALL TAXABLE PROPERTY MUST BE ASSESSED AT ITS FULL CASH VALUE. Land and improvements thereon shall be separately assessed. Cultivated and uncultivated land of the same quality and similarly situated shall be assessed at the same value. A MORTGAGE, DEED OF TRUST, CONTRACT, OR OTHER OBLIGATION BY WHICH A DEBT IS SECURED SHALL, FOR THE PURPOSES OF ASSESSMENT AND TAXATION, BE DEEMED AND TREATED AS AN INTEREST IN THE PROPERTY AFFECTED THEREBY, EXCEPT AS TO RAILROAD AND OTHER QUASI-PUBLIC CORPORATIONS. In the case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situated. The taxes SO LEVIED SHALL BE A LIEN UPON THE PROPERTY AND SECURITY, and may

be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured. If the owner of the property shall pay the tax so levied on such security it shall constitute a payment thereon, and, to the extent of such payment, a full discharge thereof. If any such security or indebtedness shall be paid by any such debtor or debtors after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year; and every contract by which a debtor is obliged to pay any tax or assessment on money loaned or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void. (In effect March 7, 1881.)

Section 3629.

Contents of statement required by assessor.

He must exact from each person a statement, under oath, setting forth specifically all the real and personal property owned by such person or in his possession or under his control, at twelve o'clock, m., on the first Monday in March. Such statement shall be in writing, showing, separately:

1. ALL PROPERTY BELONGING TO, CLAIMED BY, OR IN THE POSSESSION OR UNDER THE CONTROL OR MANAGEMENT OF SUCH PERSON.

2. All property belonging to, claimed by, or in the possession or under the control or management of any firm of which such person is a member.

3. All property belonging to, claimed by, or in the possession or under the control or management of any corporation of which such person is president, secretary, cashier, or managing agent.

4. The county in which such property is situated, or in which it is liable to taxation, and (if liable to taxation in the county in which the statement is made) also the city, town, township, school district, road district, or other revenue districts in which it is situated.

5. An exact description of all lands in parcels or subdivisions, not exceeding six hundred and forty acres each, and the sections and fractional sections of all tracts of land containing more than six hundred and forty acres, which have been sectionized by the United States Government, improvements, and personal property, including all vessels, steamers, and other water craft, and all taxable State, county, city, or other municipal or public bonds, and the taxable bonds of any person, firm, or corporation, and deposits of money, gold dust, or other valuables, and the names of the persons with whom such deposits are made, and the places in which they may be found, all mortgages, deeds of trust, contracts, and other obligations by which a debt is secured, and the property in the county affected thereby.

6. All solvent credits, unsecured by deed of trust, mortgage, or other lien on real or personal property, due or owing to such person, or any firm of which he is a member, or due or owing to any corporation of which he is president, secretary, cashier, or managing agent, deducting from the sum total of such credits such debts only, unsecured by trust deed, mortgage, or other lien on real or personal property, as may be owing by such person, firm, or corporation to *bona fide* residents of this State. No debt shall be so deducted unless the statement shows the amount of such debt, as stated under oath, in aggregate: *Provided*, In case of banks the statement is not required to show the debt in detail or to whom it is owing, but the assessor shall have

the privilege of examining the books of such banks to verify said statement. Whenever one member of a firm, or one of the proper officers of a corporation, has made a statement showing the property of the firm or corporation, another member of the firm or another officer need not include such property in the statement made by him, but his statement must show the name of the person or officer who made the statement in which such property is included. (In effect March 7, 1881).

Section 3628.

Assessments, how, by whom.

The franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization as hereinafter provided for. Other franchises, if granted by the authorities of a county, city, or city and county, must be assessed in the county, city, or city and county within which they were granted; if granted by any other authority they must be assessed in the county in which the corporations, firms, or persons owning or holding them have their principal place of business. ALL OTHER TAXABLE PROPERTY shall be assessed in the county, city, city and county, town, township, or district in which it is situated. Land shall be assessed in parcels or subdivisions not exceeding six hundred and forty acres each, and tracts of land containing more than six hundred and forty acres, which have been sectionized by the United States Government, shall be assessed by sections or fractions of sections. The assessor must, between the first Mondays of March and July in each year, ascertain the names of all taxable inhabitants, AND ALL PROPERTY IN HIS COUNTY subject to taxation, except such as is required to be assessed by the State board of equalization, and must assess such property

to the persons by whom it was owned or claimed or in whose possession or control it was at twelve o'clock m. of the first Monday of March next preceding, but no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid. In assessing solvent credits not secured by mortgage or trust deed a reduction therefrom shall be made of debts due to *bona fide* residents of this State. (In effect March 22, 1880.)

Section 3650.

Property, how listed.

The assessor must prepare an assessment book, with appropriate headings alphabetically arranged, unless otherwise directed by the State board of equalization, in which must be listed all property within the county and in which must be specified in separate columns under the appropriate head:

1. The name of the person to whom the property is assessed.

2. Land, by township, range, section, or fractional section, and when such land is not a Congressional division or subdivision by metes and bounds or other description sufficient to identify it, giving an estimate of the number of acres (not exceeding in each and every tract six hundred and forty acres), locality, and the improvements thereon. When any tract of land is situate in two or more school, road, or other revenue district of the county the part in each township or district must be separately assessed, together with the improvements thereon.

3. City and town lots, naming the city or town and the number of the lot and block, according to the system of numbering in such city or town, and improvements thereon.

4. All personal property, showing the number, kind, amount, and quality, but a failure to enumerate in detail such personal property does not invalidate the assessment.

5. The cash value of real estate other than city or town lots.

6. The cash value of improvements on such real estate.

7. The cash value of city and town lots.

8. The cash value of improvements on city and town lots.

9. The cash value of improvements on real estate assessed to persons other than the owners of real estate.

10. THE CASH VALUE OF ALL PERSONAL PROPERTY, EXCLUSIVE OF MONEY.

11. The amount of money.

12. THE ASSESSMENT OF THE FRANCHISE, ROADWAY, ROADBED, RAILS, AND ROLLING-STOCK of any railroad, as apportioned to his county by the State board of equalization, and also such other apportionments of such franchises, roadways, roadbeds, rails, and rolling-stock as may be made by such board and furnished to him for the purpose of taxation in any district in his county. Taxable improvements owned by any person, firm, association, or corporation located upon land exempt from taxation, shall, as to the manner of assessment, be assessed as other real estate upon the assessment roll. No value shall, however, be assessed against the exempt land, nor under any circumstances shall the land be charged with or become responsible for the assessment made against any taxable improvements located thereon.

13. The school, road, and other revenue districts in which each piece of property assessed is situated.

14. The total value of all property.

15. WHEN ANY PROPERTY, EXCEPT THAT OWNED BY A RAILROAD OR OTHER QUASI-PUBLIC CORPORATION, IS SUBJECT TO OR AFFECTED BY A MORTGAGE, DEED OF TRUST, CONTRACT, OR OTHER OBLIGATION BY WHICH A DEBT IS SECURED HE MUST ENTER, IN THE PROPER COLUMN, THE VALUE OF SUCH SECU-

RITY AND DEDUCT THE SAME. In entering assessments containing solvent credits subject to deductions as provided in section three thousand six hundred and twenty-eight of this code he must enter, in the proper column, the value of the debts entitled to exemption and deduct the same. In making the deductions from the total value of property assessed, as above directed, he must enter the remainder in the column provided for the total value of all property for taxation. EACH FRANCHISE MUST BE ENTERED ON THE ASSESSMENT ROLL WITHOUT COMBINING THE SAME WITH OTHER PROPERTY OR THE VALUATION THEREOF.

Franchise separately entered.

16. The figure one (1), in separate columns, opposite the name of every person liable to pay a poll-tax.

17. Such other things as the State board of equalization may require. The State board of equalization my direct the books to be otherwise than alphabetically arranged in any county or city and county of this State.

SEC. 10. So much of section three thousand six hundred and fifty of the political code as requires the assessor to put in a separate column of the assessment book the assessment of railways as apportioned to his county by the State board of equalization is hereby repealed. (In effect March 9, 1883.)

Section 3665.

The State board of equalization must meet at the State capitol on the first Monday in August, and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the board must assess the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county. ASSESSMENT MUST BE MADE to the corporation, PERSON, or ASSOCIATION OF PERSONS

Assessment as basis of taxation.

owning the same, and must be MADE UPON THE ENTIRE RAILWAY WITHIN THE STATE, AND MUST INCLUDE THE RIGHT OF WAY, BRIDGES, CULVERTS, WHARVES, AND MOLES UPON WHICH THE TRACK IS LAID, AND ALL STEAMERS WHICH ARE ENGAGED IN TRANSPORTING PASSENGERS, FREIGHTS, AND PASSENGER AND FREIGHT CARS ACROSS WATERS WHICH DIVIDE THE ROAD. The depots, stations, shops, and buildings erected upon the space covered by the right of way are assessed by the assessor of the county wherein they are situate. Within ten days after the third Monday of August the board must apportion the total assessment of the franchise, roadway, roadbed, rails, and rolling stock of each railway to the counties, or cities and counties in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and counties. The board must also, within said time, transmit by mail to the county auditor of each county, city and county to which such apportionment shall have been made, a statement showing the length of the main track of such railway within the county, or city and county, with a description of the whole of the said track within the county, or city and county, including the right of way by metes and bounds or other description sufficient for identification, the assessed value per mile of the same as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails, and rolling stock of such railway within the State, and the amount apportioned to the county, or city and county. The auditor must enter the statement on the assessment roll or book of the county, or city and county, and where the county is divided into assessorial townships or districts then on the roll or book of any township or district he may select and enter the amount of the assess-

ment apportioned to the county, or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation either of the county, city, and county, or such township or district. On the first Monday in October the board of supervisors must make and cause to be entered in the proper record book an order stating and declaring the length of main track of the railway assessed by the board of equalization within the county the assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school and road district, or lesser taxing district in the county, or city and county, through which such railway runs, as fixed by the State board of equalization, which shall constitute the assessment value of said property for taxable purposes in such city, town, township, school, road, or other district; and the clerk of the board of supervisors must transmit a copy of each order or equalization to the city council or trustees, or other legislative body of incorporated cities or towns, the trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purpose as the property of individuals within such city, town, township, school, road, and lesser taxation districts, respectively. If the OWNER of a railway assessed by the State board of equalization is dissatisfied with the assessment made by the board, such OWNER may, at the meeting of the board, under the provision of section three thousand six hundred and ninety-one of the Political Code, between the third Monday in August and the third Monday in September, apply to the board to have the

same corrected in any particular, and the board may correct and increase or lower the assessment made by it, so as to equalize the same with the assessment of other property in the State. If the board shall increase or lower any assessment previously made by it, it must make a statement to the county auditor of the county affected by the change in the assessment, of the change made, and the auditor must note such change upon the assessment book or roll of the county as directed by the board. (In effect, March 9, 1883.)

Section 3666.

"Record of Assessment of Railways;" how prepared.

The State board of equalization must prepare each year a book to be called "Record of Assessment of Railways," in which must be entered each assessment made by the board, either in writing, or both by writing and printing. Each assessment so entered must be signed by the chairman and clerk. The record of apportionment of the asssessments made by the board to the counties, and cities and counties, must be made in a separate book, to be called "Record of Apportionment of Railway Assessments." In such last-described book must be entered the names of the railways assessed by the board, the names of the corporation to which, OR THE NAME OF THE PERSON OR ASSOCIATION TO WHOM, EACH RAILWAY WAS ASSESSED, the whole number of miles of railway in the State, the number of miles thereof in each county, or city and county, the total assessment of the franchise, roadway, roadbed, rails, and rolling stock for purpose of State taxation, and the amount of the apportionment of such total assessment to each county, and city and county, for county, and city and county taxation. Before the third Monday of October of each year the clerk of the State

board of equalization must prepare and transmit to the comptroller of States duplicates of the "Record of Assessment of Railways" and "Record of Apportionment of Railway Assessments," each certified by the chairman and clerk of the board, and to be known, respectively, as "Duplicate Record of Assessment of Railways" and "Duplicate Record of Apportionment of Railway Assessments." In the last-named duplicate two columns must be added, in one of which the controllor must enter the State taxes due the State upon the whole assessment of each CORPORATION, PERSON, OR ASSOCIATION, and in the other the county, or city and county, taxes due upon the assessment apportioned to each county, or city and county, by each CORPORATION, PERSON, OR ASSOCIATION. The two duplicates constitute the warrant for the controller to collect the State and county, and city and county, taxes levied upon such property assessed by the Board, and the amount of the apportionment of the assessment to each county, and city and county, respectively. (In effect March 9, 1883.)

Section 3667.

Report of Board of Supervisors; transmission of, to controller.

When the Board of Supervisors of each county, and city and county, to which the State Board of Equalization has apportioned the assessment of railways shall have fixed the rate of county, or city and county, taxation, the clerk of the Board of Supervisors must forthwith, by mail, postage paid, transmit to the controller a statement of the rate of taxation levied by the Board of Supervisors for county, or city and county, taxation. If the clerk fails to transmit such statement the controller must obtain the information as to such rate of taxation from other sources. On or before the fourth Monday of October the controller must compute and enter in separate money columns in the "Duplicate Record of Apportionment of

Railway Assessments" the respective sums, in dollars and cents, rejecting fractions of a cent, to be paid by the CORPORATION, PERSON, OR ASSOCIATION liable therefor, as the State tax upon the total amount of the assessment and the county, or city and county, tax upon the apportionment of the assessment to each county, and city and county, of the property assessed to such CORPORATION, PERSON, OR ASSOCIATION named in said duplicate record." (In effect March 9, 1883.)

Section 3668.

Publication of notice by Controller.

Within ten days after the fourth Monday in October, the Controller must publish a notice for two weeks in one daily newspaper of general circulation at the State Capital and in two daily newspapers of general circulation published in the city of San Francisco, specifying—

1. That he has received from the State Board of Equalization the "Duplicate Record of Assessments of Railways" and the "Duplicate Record of Apportionment of Railway Assessments."

2. That the taxes are now payable and will be delinquent on the last Monday in December next, at six o'clock p. m., and unless paid to the State Treasurer, at the Capitol, prior thereto, five per cent. will be added to the amount thereof. On the last Monday in December of each year, at six o'clock P. M., all of unpaid taxes are delinquent, and thereafter there must be collected by the State treasurer or other proper officer an addition of five per centum, which sum, when collected, must be set aside by the treasurer as a fund with which to pay the contingent expenses of actions against any delinquents; the said expenses to be audited by the board of examiners. When any taxes are paid to the State treasurer by order of the controller

upon assessments made and apportioned by the State Board of Equalization the controller must forthwith notify the auditor and treasurer, respectively, of each county, and city and county, that such taxes have been paid, and the amount thereof to which each county and city and county interested is entitled. The State's portion of the taxes must be distributed by the treasurer to each fund entitled thereto, and the portion belonging to the counties, and cities and counties, must be placed in a fund to be called "railway tax fund," to the credit of each county, and city and county, entitled thereto. When any taxes are placed in the "railway tax fund" to the credit of a county, or city and county, the controller, at the next settlement with the controller by the treasurer of such county, or city and county, must draw and deliver to such treasurer his warrant upon the State treasurer for the amount in the fund to the credit of such county or city and county. (In effect March 9, 1883.)

Section 3669.

Recovery of taxes illegally collected.

Each CORPORATION, PERSON, or ASSOCIATION assessed by the State Board of Equalization must pay to the State treasurer, upon the order of the controller, as other moneys are required to be paid into the treasury, the State and county and city and county taxes each year levied upon the property so assessed to it or him by said Board. Any CORPORATION, PERSON, or ASSOCIATION dissatisfied with the assessment made by the board, upon the payment of the taxes due upon the assessment complained of, and the five per cent. added, if to be added, on or before the first Monday in February, and the filing of notice with the controller of an intention to begin an action may, not later than the first Monday of February, bring an action against the

State treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax or of the assessment upon which the taxes are levied in whole or in part. A copy of the complaint and of the summons must be served upon the treasurer within ten days after the complaint has been filed, and the treasurer has thirty days within which to demur or answer. At the time the treasurer demurs or answers he may demand that the action be tried in the superior court of the county of Sacramento. The attorney general must defend the action. The provisions of the code of civil procedure relating to pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for. If the final judgment be against the treasurer upon presentation of a certified copy of such judgment to the controller he shall draw his warrant upon the State treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected, and the cost of such action, audited by the board of examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated, and the controller may demand and receive from the county or city and county interested the proportion of such costs, or may deduct such proportion from any money then or to become due to said county or city and county. Such action must be begun on or before the first Monday in February of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action. (In effect March 9, 1883.)

Section 3670.

Collection of delinquent taxes by controller.

After the first Monday of February of each year the controller must begin an action in the proper court in the name of the people of the State of California to collect the delinquent taxes upon the property assessed by the State board of equalization, such suit must be for the taxes due the State and all the counties and cities and counties upon property assessed by the board of equalization and appearing delinquent upon the "Duplicate record of apportionment of railway assessments." The demands for State and county and city and county taxes may be united in one action. In such action a complaint in the following form is sufficient:

(Title of Court.)

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

(Naming the Defendant.)

Plaintiff avers that on the — day of ——, in the year (naming the year), the State board of equalization assessed the franchise, roadway, roadbed, rails, and rolling-stock of the defendant at the sum of (naming it) dollars; that the board apportioned the said assessment as follows: To the county of (naming it) the sum of (naming it) dollars (and so on, naming each county).

That the defendant is indebted to the plaintiff for State and county taxes for the year eighteen —— in the following sums: For State taxes, in the sum of (naming it) dollars; for county taxes of the county of (nam- it), in the sum of (naming it) dollars, etc., with five per cent. added for non-payment of taxes. Plaintiff demands payment for said several sums, and prays that an attachment may issue in form as prescribed in section

five hundred and forty-five of the Code of Civil Procedure.

(Signed by the comptroller or his attorney.)

On the filing of such complaint the clerk must issue the writ of attachment prayed for, and such proceedings shall be had as under writs of attachment issued in civil action. No bond nor affidavit previous to the issuing of the attachment is required. If in such action the plaintiff recover judgment, there shall be included in the judgment as counsel fees, and in case of judgment of taxes after suit brought before judgment the defendant must pay as counsel fees such sum as the court may determine to be reasonable and just. Payment of the taxes on the amount of the judgment in the case must be made to the State treasurer. In such action the duplicate record of assessments of railways and the duplicate record of apportionment of railway assessments, or a copy of them, certified by the controller, showing unpaid taxes against any corporation, person, or association for property assessed by the State board of equalization, is *prima facie* evidence of the assessment, the property assessed, the delinquency, the amount of the taxes due and unpaid to the State and counties, or cities and counties, therein named, and that the corporation, person, or association is indebted to the State of California in the amount of taxes, State and county and city and county therein appearing unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. (In effect March 9, 1883.)

Section 3664.

Assessment of railway property by State board of equalization.

The president, secretary, or managing agent, or such other officer as the State

board of equalization may designate, of ANY CORPORATION, and EACH PERSON OR ASSOCIATION OF PERSONS OWNING OR OPERATING ANY RAILROAD IN MORE THAN ONE COUNTY in this State, shall, on or before the first Monday in April of each year, furnish the said board a statement signed and sworn to by one of SUCH OFFICERS, OR BY THE PERSON, OR ONE OF THE PERSONS, FORMING SUCH ASSOCIATION, showing in detail for the year ending on the first Monday of March in each year:

1. The whole number of miles of railway in the State, and where the line is partly out of the State, the whole number of miles without the State, the whole number within the State owned and operated by such corporation, person, or association.

2. The value of the roadway, roadbed, and rails of the whole railway, and the value of the same within the State.

3. The width of the right of way.

4. The number of each kind of all rolling stock used by such corporation, person, or association in operating the entire railway, including the part without the State.

5. Number, kind, and value of rolling stock owned and operated in the State.

6. Number, kind, and value of rolling stock used in the State, but owned by the party making the returns.

7. Number, kind, and value of rolling stock owned, but used out of the State, either upon divisions of road operated by the party making the returns, or by and upon other railways.

Also showing in detail for the year preceding the first of January:

1. The gross earnings of the entire road.

2. The gross earnings of the road in the State, and where the railway is let to other operators, how much was derived by the lessor as rental.

3. The cost of operating the entire road, exclusive of sinking fund, expenses of land department, and money paid to the United States.

4. Net income of such year, and amount of dividend declared.

5. Capital stock authorized.

6. Capital stock paid in.

7. Funded debt.

8. Number of shares authorized.

9. Number of shares of stock issued.

10. Any other facts the State Board of Equalization may require.

11. A description of the road, giving the points of entrance into and the point of exit from each county, with a statement of the number of miles in each county. When a description of the road shall once have been given no other annual description thereafter is necessary unless the road shall have been changed. Whenever the road, or any portion of the road, is advertised to be sold, or is sold, for taxes, either State or county, no other description is necessary than that given by, and the same is conclusive upon, the corporation, person, or association giving the description. No assessment is invalid on account of a misdescription of the railway or the right of way for the same. If such statement is not furnished, as above provided, the assessment made by the State Board of Equalization upon the property of the CORPORATION, PERSON, or ASSOCIATION failing to furnish the statement is conclusive and final. (In effect March 9, 1883).

NOTE.—This section is cited to show that the laws of California recognize the fact that natural persons and associations, not corporate, may, and do, own and operate railroads.

Section 3665 shows the same thing.

Section 3666 shows the same thing.

And section 1001 of the Civil Code, and sections 1237, 1238, 1240, and 1244 of the Code of Civil Procedure contain express authority and confer express authority to that effect.

CIVIL CODE.

SECTION 14 declares that the word "person" includes corporations. Persons and corporations.

CARRIERS.

SEC. 2110. Property carried is called freight; the reward, if any, to be paid for its carriage, is called freightage; the person who delivers the freight to the carrier is called the consignor, and the person to whom it is to be delivered is called the consignee. General definitions.

SEC. 2168. Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry. What constitutes a common carrier.

SEC. 2170. A common carrier must not give preference, in time, price, or otherwise, to one person over another. Every common carrier of passenger by railroad, or by vessel plying upon waters lying wholly within this State, shall establish a schedule time for the starting of trains or vessels from their respective stations or wharves, of which public notice shall be given, and shall, weather permitting, except in case of accident or detention caused by connecting lines, start their said trains or vessels at or within ten minutes after the schedule time so established and notice given, under a penalty of two hundred and fifty dollars for each neglect so to do, to be recovered by action before any court of competent jurisdiction, upon com- Obligation not to give preference.

plaint filed by the district attorney of the county in the name of the people, and paid into the common-school fund of the said county.

PERSONS.

Divisions of civil code.

SEC. 1. This act shall be known as the Civil Code of the State of California, and is in four divisions, as follows:

I. The first relating to persons.

II. The second to property.

III. The third to obligations.

IV. The fourth contains general provisions relating to the three preceding divisions.

CORPORATIONS.

Corporation defined.

SEC. 283. A corporation is a creature of the law, having certain powers and duties of a natural person. Being created by the law, it may continue for any length of time which the law prescribes.

For what purpose private corporations are formed.

SEC. 286. Private corporations may be formed for any purpose for which individuals may lawfully associate themselves.

Powers of corporations.

SEC. 354. Every corporation, as such, has power—

1. Of succession, by its corporate name, for the period limited, and, when no period is limited, perpetually;

2. To sue and be sued in any court;

3. To make and use a common seal, and alter the same at pleasure;

4. To purchase, hold, and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in this part;

5. To appoint such subordinate officers or agents as the business of the corporation may require and to allow them suitable compensation.

6. To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock.

7. To admit stockholders or members and to sell their stock or shares for the payment of assessments or instalments.

8. To enter into any obligations or contracts essential to the transaction of its ordinary affairs or for the purposes of the corporation.

MINING PARTNERSHIPS.

When a mining partnership exists.

SEC. 2511. A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same.

Express agreement not necessary to constitute.

SEC. 2512. An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interests in the mine and working the same for the purpose of extracting the minerals therefrom.

Profits and losses, how shared.

SEC. 2513. A member of a mining partnership shares in the profits and losses thereof in the proportion which the interest or share he owns in the mine bears to whole partnership capital or whole number of shares.

Lien of partners.

SEC. 2514. Each member of a mining partnership has a lien on the partnership property for the debts due the creditors thereof and for money advanced by him for its use. This lien exists notwithstanding there is an agreement among the partners that it must not.

Mine—partnership property.

SEC. 2515. The mining ground owned and worked by partners in mining, whether purchased with partnership funds or not, is partnership property.

Partnership not dissolved by sale of interest.

SEC. 2516. One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership. The purchaser, from the date of his purchase, becomes a member of the partnership.

Purchaser takes subject to lien unless, &c.

SEC. 2517. A purchaser of an interest in the mining ground of a mining partnership takes it subject to the liens existing in favor of the partners for debts due all creditors thereof or advances made for the benefit of the partnership, unless he purchased in good faith for a valuable consideration without notice of such lien.

Takes with notice of lien, when.

SEC. 2518. A purchaser of the interest of a partner in a mine when the partnership is engaged in working it takes with notice of all liens resulting from the relation of the partners to each other and to the creditors of the partnership.

Contract in writing, when binding.

SEC. 2519. No member of a mining partnership or other agent or manager thereof can, by a contract in writing, bind the partnership, except by express authority derived from the members thereof.

Owners of majority of shares govern.

SEC. 2520. The decision of the members owning a majority of the shares or interests in a mining partnership binds it in the conduct of its business.

EMINENT DOMAIN.

Property, how acquired.

SEC. 1000. PROPERTY is acquired by—

1. Occupancy;
2. Accession;
3. TRANSFER;
4. Will; or
5. Succession.

Acquisition of property by exercise of eminent domain.

SEC. 1001. ANY PERSON MAY, WITHOUT FURTHER LEGISLATIVE ACTION, acquire private property for any use specified in section 1238 of the Code of Civil Procedure, EITHER BY CONSENT OF THE OWNER OR BY PROCEEDINGS HAD UNDER THE PROVISIONS OF TITLE VII., PART III, OF THE CODE OF CIVIL PROCEDURE; and ANY PERSON seeking to acquire property for any of the uses mentioned in such title is "an agent of the State," or a "PERSON in charge of such use," within the meaning of those terms as used in such

title. This section shall be in force from and after the fourth day of April, eighteen hundred and seventy-two.

CODE OF CIVIL PROCEDURE.

EMINENT DOMAIN.

Eminent domain defined.

SEC. 1237. Eminent domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title.

Purposes for which it may be exercised.

SEC. 1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Fortifications, magazines, arsenals, navy-yards, navy and army stations, lighthouses, range and beacon lights, coast surveys, and all other public uses authorized by the Government of the United States.

2. Public buildings and grounds for the use of the State, and all other public uses authorized by the Legislature of this State.

3. Public buildings and grounds for the use of any county, incorporated city, or city and county, village, town, or school districts, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, incorporated city, or city and county, village, or town, or for draining any county, incorporated city, or city and county, village, or town; raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; roads, streets, and alleys, and all other public uses for the benefit of any county, incorporated city, or city and county, village, or town, or the inhabitants thereof, which may be authorized by the Legislature; but the mode of apportioning and correcting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

4. Wharves, docks, piers, shutes, booms, ferries, bridges, toll-roads, by-roads, plank and turnpike roads, STEAM AND HORSE RAILROADS, canals, ditches, flumes, aqueducts and pipes, for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.

5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.

6. By-roads leading from highways to residences and farms.

7. Telegraph lines.

8. Sewerage of any incorporated city, or city and county, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than ten families, or of any public buildings belonging to the State, or to any college or university.

Private property defined; classes enumerated.

SEC. 1240. The private property which may be taken under this title includes—

1. All real property belonging to any person.

2. Lands belonging to this State, or to any county, incorporated city, or city and county, village, or town, not appropriated to some public use.

3. PROPERTY APPROPRIATED TO PUBLIC USE; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated.

4. Franchises for toll-roads, toll-bridges, and ferries, and all other franchises; but such franchises shall not be taken unless for

free highways, railroads, or other more necessary public use.

5. All rights of way for any and all the purposes mentioned in section twelve hundred and thirty-eight, and any and all structures and improvements thereon, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by any other right of way or improvements, or structures thereon. They shall also be subject to a limited use in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury.

6. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

Section 1244.

The complaint must contain:

The complaint and its contents.

1. The name of the CORPORATION, ASSOCIATION, COMMISSION, or PERSON in charge of the public use for which the property is sought, who must be styled plaintiff.

2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.

3. A statement of the right of the plaintiff.

4. If a right of way be sought, the complaint must show the location, general route, and *termini*, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding.

5. A description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract. All parcels lying in the county, and required for the same public use,

may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties.

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Annual statement of property subject to, required. Sec. 8, Art. 13, Const.
Duties of assessor in regard to. Sec. 3650, Polit. Code.
Power of, cannot be surrendered. Sec. 6, Art. 13, Const.
Publication of notice regarding, by controller. Sec. 3668, Polit. Code.
To be in proportion to value. Sec. 1, Art. 13, Const.

Taxes:
Collection of delinquent, by controller. Sec. 3670, Polit. Code.
Contract of borrower to pay, on loan, void. Sec. 5, Art. 13, Const.
Income. Sec. 11, Art. 13, Const.
Manner of recovering, illegally collected. Sec. 3669, Polit. Code.
Payment of, by instalments. Sec. 7, Art. 13, Const.
Poll. Sec. 12, Art. 13, Const.

IN THE

Supreme Court of the United States

OCTOBER TERM 1887.

CALIFORNIA TAX CASES.

Nos. 660, 661, 662, 663, 664, and 1,157.

Points Submitted by Mr. EDMUNDS, of Counsel for Defendants in Error.

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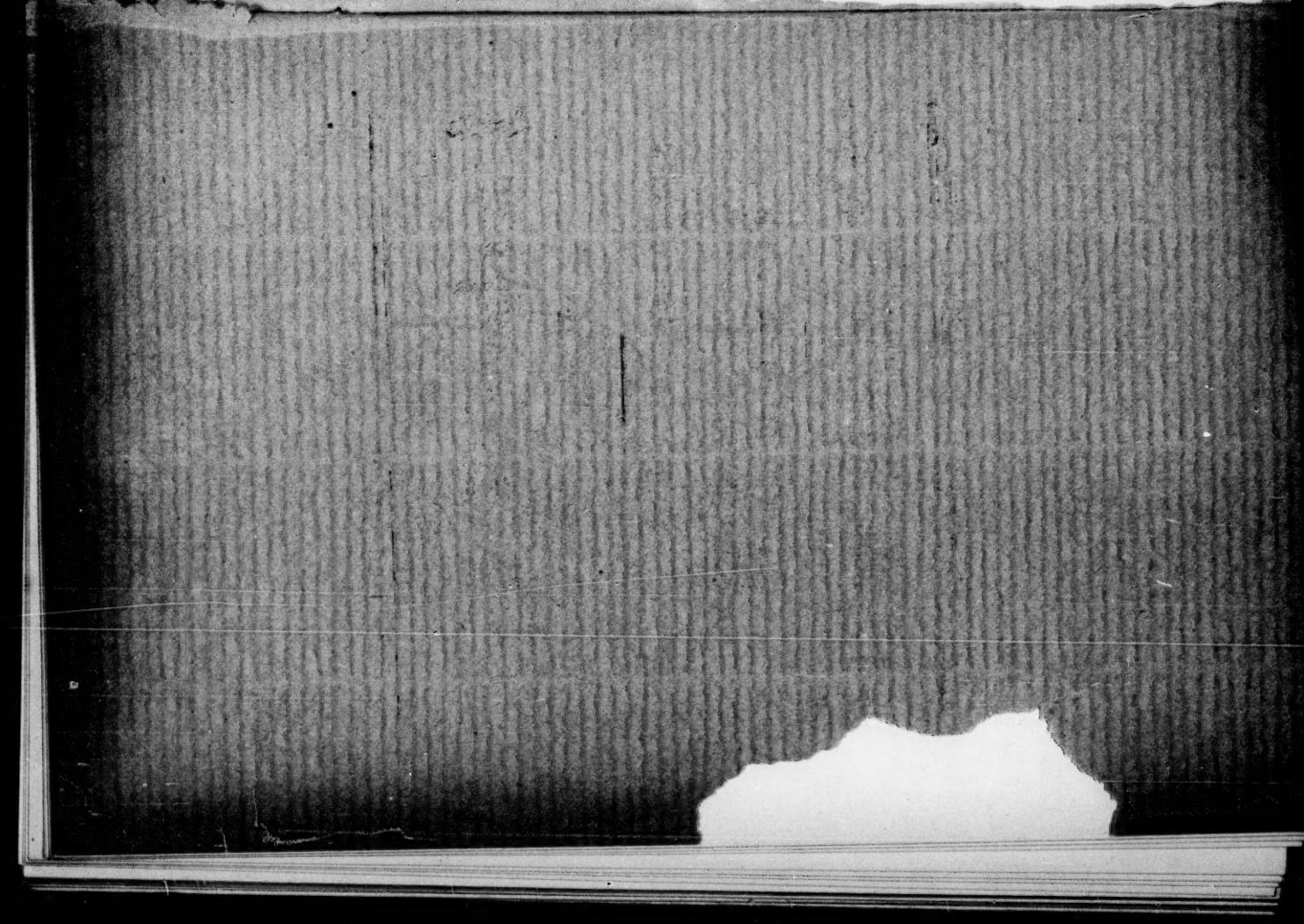

IN THE

Supreme Court of the United States.

October Term, 1887.

CALIFORNIA TAX CASES.

Nos. 660, 661, 662, 663, 664, and 1,157.

Points Submitted by Mr. Edmunds, of Counsel for Defendants in Error.

Two great and principal questions exist in all these cases.

I.

Whether the tax imposed by the State of California upon the franchises of the defendants in error is an invasion of the rights of the defendants existing and carried on under the authority of the United States.

II.

Whether such invasion, if allowable at all, has been exerted by the State of California in such a way as to make an unjust and unconstitutional discrimination as it regards the taxation of their property as compared with the taxation of the property of other persons and corporations in that State, so as to deny to these defendants the equal protection of her laws.

On the first point I beg leave to refer to the very complete argument of Mr. Creed Haymond on the subject, which is filed herewith.

In addition to this I submit:

a.

That, according to the tenor of the California law, the "*franchises*" of the defendants are made the subjects of this State taxation. (See Constitution of 1879, Article XIII, sec. 1, 17th paragraph of answer in No. 660, Record, p. 128, and Stipulation in same number, Record, p. 37; Finding No. 1 in same number, Record, p. 39.)

b.

This franchise, so taxed, is defined to be "a certain privilege conferred by grant from the Government and vested in individuals" (Bouvier Law Dictionary, Title Franchise). "A corporation is a political person, capable, like a natural person, of enjoying a variety of franchises; it is to a franchise as is the substance to its attribute; it is something to which many attributes belong, but is itself something distinct from those attributes." (Blackstone's Comm., 37; 1 Kyd., 15; Angell & Ames on Corp., Sec. 4.) The being, then, of the corporation is one thing, as that of a natural person is, while its right and capacity to exert certain faculties imputed to it by the sovereign authority is quite another. It may be admitted, then, for this purpose, that the being of the defendants exists solely by virtue of a State creation, while it may be justly affirmed that the faculties (viz., the franchises) they exert are exercised and exerted as of right and under duty by force of the acts of Congress.

Congress has certainly provided, with the binding and irrevocable consent of the defendants, that they *shall* carry mails, troops, etc., etc., for the National benefit and protection, not only within the State of California, but over the whole length, one and indivisible, of the structures they have erected from the shores of the Pacific far to the eastward of the boundaries of that State, under the terms and regulations provided by the same acts of Congress. And to this, indeed, as to one of the defendants, the State of California has affirmatively consented, although I submit that such consent was quite unnecessary. The chief and most important franchises (faculties), therefore, that these corporations exercise are those exerted under, and in obedience to, the lawful authority of the United States.

It is no answer to say that within the territory of California the same faculties might be lawfully exerted pursuant to State law, for this is a mere attempt to flank the question. Given the right and duty of carrying the troops and mails of the United States derived from two sources of power—the one limited and particular, the other paramount and universal—when the author of the first undertakes to burden or destroy this right, its authority must fail, unless it be shown that the limited and particular is more powerful than the unlimited and universal.

It is an axiom in jurisprudence that now needs no authority to support it, that the power of taxation includes the power of destruction.

Suppose the State of California, under its power to amend the charters of the defendants, should pass a law declaring that they should not carry the troops and mails of the United States, and that the defendants, notwithstanding, should continue to do so, and a *quo warranto* should be thereupon brought in the State Courts to condemn these corporations for so doing? Can it be open

to question that the perfect and decisive answer would be that they were doing these things under the authority and obligation conferred and imposed by a statute of the United States?

It is submitted, then, that the inexorable dilemma exists either that the United States have exerted their authority and advanced their money upon and to these companies for the great National objects mentioned in the statutes, to be held and exercised merely at the will and pleasure of the State, or else that these franchises and faculties mentioned in the acts of Congress are above and beyond any State interference whatever, either by taxation or otherwise.

That Congress had the constitutional power to make the provisions referred to, and that these companies had the constitutional right to accept and become bound by them, has not yet been questioned. They are unquestionable. So standing, the interference by the State in the form of taxation is one of the many modes by which States have attempted, and may continue to attempt, to hinder, or burden, or frustrate the carrying on of National operations. In taxing the franchises of the defendants, therefore, the State is taxing, not the being of the corporation, but the doing by the corporation of the very things that the National authority has authorized and required them to do.

It hardly need be stated that these considerations are quite apart from the question of the right of the State to tax a share of the stock, or a locomotive, or a station-house of the defendants as the actual and visible property—the thing—as distinguished from the taxation of the doing of those things required by the laws of the United States.

The State may tax the person and the property of the President of the United States, or of the judges of this Court, but it may not tax (as it has been settled)

the compensation that the United States makes to these officers for performing their National duty, for this (just like the present cases) is in reality a taxation of the service rendered under National authority.

As to the second proposition mentioned in the opening—

The Constitution adopted in 1849 provided (article XI, section 13) that "taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law." * * * The Constitution of 1879 provided (article XIII, sections 1, 4, 9, 10, and 13):

"CONSTITUTION OF 1879.

"ARTICLE XIII.

"REVENUE AND TAXATION.

"SECTION 1. All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things real, personal, and mixed, capable of private ownership; *provided*, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to *bona-fide* residents of this State.

"SEC. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. *Except as to railroad and other quasi-public corporations*, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof; *provided*, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy of the preceding year.

"SEC. 9. A State Board of Equalization, consisting of one member from each Congressional District in this State, shall be elected by the qualified electors of their respective districts at the general election to be held in the year one thousand eight hundred and seventy-nine, whose term of office, after those first elected, shall be four years, whose duty it shall be to equalize the valuation of the taxable property of the several counties in the State for the purposes of taxation. The Controller of State shall be *ex-officio* a member of the Board. The Boards of Supervisors of the several counties of the State shall constitute Boards of Equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; *provided*, such State and county Boards of Equalization are hereby authorized and empowered, under such rules of notice as the County Boards may prescribe, as to the county assessments,

and under such rules of notice as the State Board may prescribe as to the action of the State Board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to to the true value in money of the property contained in said roll.

"SEC. 10. All property, except as hereinafter in this section provided, shall be asssessed in the county, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts.

"SEC. 13. The Legislature shall pass all laws necessary to carry out the provisions of this article."

And the Political Code of California, as amended in 1880, provided (section 3664):

"POLITICAL CODE OF CALIFORNIA,

"AS AMENDED IN 1880.

"SEC. 3664. On or before the first Monday in May, in each year, the State Board of Equalization shall assess the franchise, road-way, road-bed, rails, and rolling stock of railroads operated in more than one county. The President, Secretary, Cashier, or Managing Agent, or such other officer as the State of Equalization may designate, of any corporation operating any railway in more than one county in this State, shall furnish such Board, on or before the first Monday of April in each year, a statement, signed and sworn to by one of such officers, showing in detail for the year ending on the first Monday in March in such year:

"(*a*) The whole number of miles of railway owned, operated, or leased, in the State by such corporation

making the return, and the value thereof per mile, with a detailed statement of all property of every kind located in the State.

"(*b*) Also a detailed statement of the number and value thereof of engines, passenger, mail, express, baggage, freight, and other cars or property, used in operating or repairing such railway in this State, and on railways which are parts of lines extending beyond the limits of this State. The return shall show the actual amount of rolling-stock in use on the corporation's line in the State during the year for which the return is made. The return shall show the amount of rolling-stock, the annual gross earnings of the entire railway, and the proportionate annual gross earnings of the same in this State, as nearly as practicable, and all the property designated hereafter in this section, and such other facts as the State Board of Equalization may in writing require.

"If such officer or officers so designated shall fail to make and furnish said statement, said Board of Equalization shall fix the value and proceed to assess the property of the corporation so failing; the valuation so fixed by them shall be final and conclusive. The said property shall be assessed at its actual value. Assessment shall be made upon the entire railway within the State, and shall include the right of way, road-bed, track, bridges, culverts, and rolling-stock. The depots, station grounds, shops, buildings, and gravel beds, shall be assessed by the Assessor of the county where situated as other property. On or before the fifteenth day of May in each year, said Board shall transmit to the County Assessor of each county, through which any railway, operated in more than one county, may run, a statement showing the length of the main track or tracks of such railway within the county, together with a description of the whole of said tracks within the county, including the right of way by metes and bounds, or other description sufficient for identification, and the assessed value per mile of the same, as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, road-bed, rails, and rolling-stock of such railway within this State. Said statement shall be entered on the assessment roll of the county. At the

first meeting of the Board of Supervisors, after such statement is received by the County Assessor, they shall make and cause to be entered in the proper record book an order stating and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township, school district, or lesser taxing district in their county through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the taxable value of said property for taxable purposes in such city, town, township, school, road, or other district; and the Clerk of the Board of Supervisors shall transmit a copy of each order of equalization to the City Council or Trustees, or other legislative body of incorporated cities or towns, the Trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. The taxes on said property for State and County purposes, after collection by the County Collector, shall be paid over to the County Treasurer as other taxes. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships, school districts, and lesser taxation districts."

The provisions of the Constitution of 1849 are referred to to demonstrate that whether the pretention heretofore set up in a former argument on behalf of the State, that the Constitution of 1879 and the Political Code of 1880 did not apply to mortgages existing before that time, whether true or not, does not relieve the plaintiff in error; for by virtue of the California statute, and as a fact in the actual administration of her authorities, a discrimination against the mortgaged property of railroads has been made and exists in all these cases, and the equal protection of the laws, as they have been practically administered, is just as much denied to the defendants, if the Constitution of 1879 does not apply to the case, as it would be if it did. If the Constitu-

tion of 1879 had never existed, we should still find that the statutes of California, and their administration in these very cases, deny to these defendants the right and privilege of having the value of their property diminished by the amount of their mortgage debt, which right is given to other citizens and corporations of the State. Section 3650 of the Political Code provides (subdivision 15) that—

"When any property, except that owned by a railroad or other *quasi*-public corporation, is subject to or affected by a mortgage, deed of trust, contract, or other obligation by which a debt is secured, he must enter in a proper column the value of such security, and deduct the sum."

And section 3692 provides—

"SEC. 3692. The powers and duties of the State Board of Equalization are as follows:

1. * * * * * * *
2. * * * * * * *
3. * * * * * * *
4. To hold regular meetings at the State capitol on the second Monday in each month, and such special meetings as the chairman may direct.
5. To annually assess the franchise, roadway, roadbed, rails, and rolling-stock of all railroads operated in more than one county in this State, at their actual value, on the first Monday in March, at 12 o'clock M., and to apportion such assessment to the counties and cities and counties in which such railroads are located, in proportion to the number of miles of railway laid in such counties, and cities and counties, in the manner provided for in section 3664 of said Code."

So that, as a statutory and administrative fact, the property, as property, of these defendants, is attempted to be taxed by the State to the full amount of its value, without any regard to or deduction of the amount of the mortgages existing upon it, while the property, as

property of all other corporations and citizens of the State is valued and measured for taxation solely and only after the amount of all mortgages upon it has been deducted.

The question, then, reduced to its simplest form, is whether such discrimination can be constitutionally made upon the ground that the defendants are railroad corporations.

Except as to the franchises which have already been discussed, and indeed literally as to these also, it will be noticed that the Constitution and laws of California treat this railroad property purely in its character *as* property and as a part of the whole mass of the things in the State which are to be taxed by the general phrase in proportion to their value and on principles of equality. But in this instance the State of California has undertaken to make a discrimination of inequality on account of the nature of the *person* described, and on nothing else. These cases are far apart from those in which it has been held that the franchises and operations of railways could be specially taxed, and in some cases without regard to the principle of equality. The cases appear on principle to be precisely like those where the States have attempted to make discriminations against national banks or their stockholders, and where, as in the case of the State of New York, it was done, not by taxing in form the stock at a higher rate than other private capital, but by the attempted evasion of giving to the owner of private capital an offset for his debts which was not given to the holder of bank stock.

If, in a single case, the test of discrimination can be made in regard to the character of the party or person as distinguished from the character of his operations or of his property, there is no limit that can be set to State inequality and tyranny in these respects. If the State

can say that railway corporations or owners shall not be entitled to the same equality of burdens as the other citizens of the State, they can say so in respect of every other corporation and in respect of every other individual. The State may distinguish on the line of age, or of race, or of sex, or of political opinion, which, of course, would be intolerable. And if the State may distinguish in regard to the deduction of mortgage or other debts, it may equally distinguish in regard to the rate of the imposition levied upon the things themselves, and say that A, because he is A, shall pay taxes upon his farm at the rate of 5 per cent., and B and C, because they are B and C, shall be taxed only at the rate of two per cent.

It appears to have been already completely settled by this Court in the case of Railroad Company *v.* Peniston, 18 Wall., page 5, and in other cases there referred to, that the personal nature of a corporation, whether existing under a State charter or under congressional authority, has nothing to do with the question of the imposition of a tax upon its property as such.

The Court, speaking through Mr. Justice Strong, states this proposition with the utmost emphasis, and it is obvious that the principle on which it rests is impregnable. It follows, then, that these cases must be treated under precisely the same rule of jurisprudence as if these defendants were private persons, citizens of California, and owning the roads in question, and the State had, in its constitution, provided that everybody, except the owners of railways and other property devoted to some *quasi*-public use, should be entitled to a deduction from the valuation of their property for their mortgage debts, but that such railroad owners should not. It is not easy to see how elaboration can make the unconstitutionality of such a proposition as this more clear.

The California Constitution itself declares, *first*, that "all property in the State not exempt under the laws of the United States, shall be taxed *in proportion to its value*, to be ascertained as provided by law." It declares, *second*, that "the word property, as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." It thus provides, in unmistakable terms, and without regard to the nature or character or residence of the owner, for the principle of equality, and establishes a definition of property, as property, which includes everything that is the subject of contest in these suits. It then proceeds in the next section of the same article to declare that, except as to railroads and other *quasi*-public corporations, property mortgaged for debts shall be taxed to the owner of it only to the extent of the value of the property beyond the mortgage debt, and that the residue shall be taxed to the mortgagee as an interest in the property. And it proceeds in a later section to require, in accordance with the description and definition of property already declared, the taxation of the franchises, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one county, according to their actual value—that is, *as property*. The Constitution itself, therefore, in terms confines itself to levying burdens upon property, and frees the question from all difficulties and discussions that might have existed and that have existed in other States in respect of the special taxation of special pursuits and occupations in their character purely as such. The greatest part of the learned argument of the gentlemen on the other side is, therefore, entirely inapplicable to the matter in hand. The framing of the Constitution was not an attempt to tax functions and operations supposed to be

specially profitable, but it evidently proceeded from the emotions of the body framing it, inimical to the people excepted out of its general just provisions for equality and fair play among the other property-holders of the State. It would have been just as logical and just as valid had it inserted in the exception the names of any number of citizens of that State whom the Convention believed to have become too rich, or to be otherwise obnoxious. It might just as lawfully have provided that all owners of vineyards or all owners of woolen mills should be allowed no deduction for their debts secured by mortgage, or should be taxed at a double valuation, while all owners of orange groves, cotton mills and all other property in the State should be taxed according to the actual value of their interest in the property. Railway corporations, grape-growers, and woolen manufacturers, (as these are all lawful and recognized pursuits,) are just as much entitled to the equal protection of the laws and to due process of law for securing that equal protection, as any other members of the community; and if the provisions of the national Constitution are yet found to mean anything and to be still in force, they must apply to cases like these, unless we are to interpolate into the unmistakable plainness of their words the exception which shall declare by judicial enactment, *first*, that due process of law does not apply to railroad corporations, and, *second*, that the equal protection of the laws does not apply to railroad corporations, or that if it does apply in some cases, it shall not apply in cases of taxation. The constitutional phrases are unequivocal, and when we remember that a large part of governmental tyranny and injustice in the world has been exerted through unequal and discriminating taxation, there should be no temptation to withhold the application of these most just and fundamental provisions from this class of subjects. It may be fully

admitted that the right, as it is usually understood, to classify property for the purposes of taxation as a *modus operandi* to reach a common and equal result is clear. But here the Constitution of California in clear terms puts all property in one classification, even including franchises, and then proceeds to deny to the *persons* called railroad corporations the benefits of equality which it gives to all other owners of precisely the same kind of property, whether that property be franchises, railroads, steamboats, lands, horses, debts, or whatever. The discrimination, then, is a discrimination between persons, and not in any sense a classification of the various kinds of property for the purposes of taxation, though it is not by any means admitted that, in respect of the taxation of property, as property—that is, the taxation of values as values—the State may impose a double taxation upon the value of the property of one man and a single taxation upon the value of the property of all others.

GEO. F. EDMUNDS,
Of Counsel for Defendant in Error.

124-1

IN THE

Supreme Court of the United States.

October Term 1887.

Nos. 660, 661, 662, 663, 664, and 1,157.

THE CALIFORNIA TAX CASES.

Suggestions Filed by Mr. Edmunds, Pursuant to Leave of the Court, on the Question Whether the Separation of the Tax on Mortgaged Property Provided for in the Constitution and Laws of California is a Mere Division of Property for the Purposes of Taxation, and not an Unequal Discrimination.

I.

The last clause of the first section of article XIII of the Constitution of 1879 reads thus:

"The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to *bona-fide* residents of this State."

The first clause of the fourth section of the same article reads thus:

"A mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purposes of as-

sessment and taxation, be deemed and treated as an interest in the property affected thereby."

The next clause of the same section reads thus:

"Except as railroad and other *quasi*-public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate."

Section 3650 of the Political Code of California, subdivision 15, enacted under this Constitution, reads thus:

"When any property, except that owned by a railroad, or other *quasi*-public corporation, is subject to or affected by a mortgage, deed of trust, contract, or other obligation by which a debt is secured, he [that is, the assessor] must enter in the proper column the value of such security, and deduct the same." * * *

It is submitted that both the language and the spirit of these provisions of the Constitution and of the laws look distinctly to diminishing the amount of the assessment upon the property of the debtors to the extent of their debts; and instead of being a division of a thing, it is the division and separation of interests, in order to arrive at the real value to the owner of it of the thing taxed, and to make the owner of every species of property taxable to the extent of the value of it to him. This, for illustration, is quite different from separation of distinct interests in real estate, like a life-estate and a remainder—the one to the tenant for life, and the other to the remainder-man, for taxation to each respectively, and wherein each would bear the burden attributable to his estate in the property, and working equally for the benefit of both. This would be true in the case in hand were it not that the Constitu-

tion and the law both provide that in respect of one particular class of persons in the State, viz., railroad or other *quasi*-public corporations, no such benefit to the debtor corporation shall be granted; while at the same time the scheme embraces (although that is not material to the present one) provisions for taxing the holder of the securities of a railway corporation in the hands of that holder just as all other credits are taxed.

So it is submitted that it is manifest that the actual result reached by plain steps is to compel the particular sort of being known as a railway corporation, because he is that sort of being, and not because he owns that sort of property, to be assessed to the full value of his property, without any deduction, while it gives to every other sort of being the right to deduct his mortgage debts from the value of his land or other mortgaged property, and to deduct from his credits the amount of his debts. The phrase, therefore, " division of property for the purposes of taxation " is inaccurate and misleading, and it comes back, by whatever path we trace it, to the fact that it is a discrimination of actual and positive burdens by which a named class of persons is excluded from the equal benefit and protection of the law that is granted to every other class of persons, whether they own that particular kind of property or not.

127-1

IN THE

Supreme Court of the United States.

October Term 1887.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff in Error,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY,
Defendant in Error.

No. 664.

Oral Argument of Mr. George F. Edmunds on Behalf of the Defendant in Error.

(Delivered January 12, 1888.)

(Reported by JAMES L. ANDEM, Stenographer, 514 F street northwest, Washington, D. C.)

Mr. EDMUNDS said:

May it please your Honors: It will be worth while to note precisely what we have before us, in respect to one or two points, before we undertake to discuss them in this case. And first, as to the franchise question, and I shall deal particularly with case No. 664, and only on the general questions.

At page 45 of the record in that case, in the thirtieth finding, this language is used:

"Said pretended assessment made by the State Board of Equalization and the tax claimed is upon all of the franchises, the existence and operation of defendant, and upon *all*."

I emphasize the word—it is not italicized in print—and I only call your attention to it, "and upon all the franchises and corporate powers held and exercised by defendant, as well as its right to exist and operate."

Then the twenty-second finding, which I may as well call your Honors' attention to, on pages 41 and 42, is in respect to the Fourteenth Amendment, and the deduction of the indebtedness of the company, and uses this language:

"The State Board of Equalization, in making the said pretended assessment, pretended to assess to and against defendant the full cash value of said railroad, roadway, road-bed, rails, rolling-stock, and franchises as described in said section 3665, without deducting therefrom the value of the mortgage, or any part thereof, given and existing thereon as aforesaid," which is also found in value "to secure the indebtedness of said company to the holders of said bonds, notwithstanding they had full knowledge of the existence of such mortgage."

Now, first as to the franchise. When I first was called to consider these cases my impression was that the contention of the State, that it had the right to tax these franchises, was probably a good one. But on investigation I have become perfectly satisfied that it is not a good one.

Granted for the sake of the argument, and as a fact, that the existence of this corporation is an existence by virtue of the law of California, just as the existence and rights of an individual, a living person, in the State of California is recognized, secured, and protected as one of the citizens and inhabitants of that State; and granted, therefore, for the sake of the argument, that the State of California might tax the corporation as a corporation; and not speaking now on the question of equality, but the mere franchise apart from the Fourteenth Amendment,—we find that that is not this case; that the Constitution of California, its laws, and its administration by this board of State officers, (which your Honors have held, and rightly,

in one of the Virginia cases, and in ever so many other places, I suppose, may be exerted through the administrating powers of a State just as well as through its Legislature, and here it is exerted by them all,) is a tax not upon the existence of this corporation, but upon the faculties that it is authorized to exert, and that it does exert.

There is no dispute about that. The Constitution begins by saying that all franchises, like everything else it enumerates—debts, dues, and property of every kind—is property, and all are to be taxed in proportion to their value.

The question, therefore, is whether the operations that this corporation is carrying on, not only in the State of California, but, as the findings show, out of it and beyond it—interstate and national operations—are merely, as it is argued on the other side, the existence of this artificial being, this association of five citizens of that State, or whether it is something more and different?

And so I insist upon it that we have not here to consider the question at all whether the State of California has the right to tax this corporation because it *is*, but the question is whether it has a right to tax this corporation in respect to *doing the things it is doing between States and over the nation*, not under the authority of the State of California, but under the authority of the laws of the United States, and in absolute obedience—in compulsory obedience—to them, and which, in respect to this particular doing, (although that is immaterial,) the State of California has consented that the United States may take hold of. That is the question.

Now, therefore, the question is, whether franchises of the company of which we are now speaking, being the right, and the exertion of that right, which the case finds did exist and is operative, to carry the troops and mails of the United States, and the interstate private commerce of the people of the United States from Ogden, in the Territory of Utah, across the whole State of Nevada and the

whole State of California, to the Pacific ocean, and the reverse, are the subject of State taxation. Whether this tax is not clearly and unmistakably, and without any escape, a tax upon the *operations of this corporation that the United States has authorized and required it to perform*, and that it is performing, as the case finds. That is the question.

If it be the question, I can hardly suppose that it is necessary to argue it. And that is the question, and it is nothing else. We have nothing to do here with the question of whether a State may tax the *existence* of a private corporation or *quasi*-public corporation (because that is a mere phrase of fancy, and does not amount to anything) created by its own laws, or in respect to freighting that it carries on within the State, under the authority of the State, and no other.

But the franchise of this corporation that the case finds it has exerted is the right, whether derived from the State or nation, or from both, to carry these troops and these mails, these supplies, and this commerce across the whole breadth of two States and half or two-thirds of the way across a Territory of the United States. That is what the case finds it is doing, and that is the only franchise that it is exerting with which this Court is called upon to deal, or that has anything to do with this case.

My learned friends cannot escape from that by asserting that it is also carrying passengers from Sacramento to San Francisco; that the State had passed laws in regard to that, or from one border of the State to another. That would be a different question; and it is not necessary to discuss it, because from the finding of the Court—a positive and affirmative finding, according to the truth, as we understand it—the chief and real value of the whole operation is that of the franchise of the defendant, derived from and exercised under the United States; and referring in a former finding to the fact that, while the defendant is a corporation created by the laws of California, that is,

organized under it, it is a corporation authorized by the laws of the United States, setting that out, which was unnecessary, of course, and stating what they are doing under that in transacting the whole of this commerce as a mass and as an entirety.

Now the State, we find, says we tax it all.

The CHIEF JUSTICE: The section of the statute authorizing the assessment is printed in your brief on page 7, is it not?

Mr. EDMUNDS: I think so.

The CHIEF JUSTICE: The section there states that the assessment shall be made "upon the entire railway within the State, and shall include the right of way, road-bed, track, bridges, culverts, and rolling-stock." And then, again, afterwards, it says, "and the assessed value per mile of the same, as fixed by a *pro-rata* distribution per mile of the assessed value of the whole franchise, roadway," &c. Is there any other provision for the taxation or assessment of the value of the franchise except that which is implied in the last provision?

Mr. EDMUNDS: It is contained in the Constitution, which says that all franchises are property like everything else; and whether it was in the law of the State, may it please your Honors, or even in the Constitution of the State, (although it is in both,) it says there that the whole franchise is property, in the very law itself, and then it limits the railway to the line of the State, the visible property. Its faculties and operations are one thing and its tangible property another.

But the intangible right to do everything that the corporation had a right to do, the Legislature in terms said, must be taxed, and it meant to say it, because it says you must take the whole franchise. This finding is, that with or without law, I do not care which, so far as the State is concerned, this body of assessors did tax the exertion of every faculty and operation that that road was carrying on.

The CHIEF JUSTICE: It says the franchise shall be included within the term "property" as used?

Mr. EDMUNDS: Yes; that is the enumeration in the Constitution—all franchises. Then it provides that they shall tax franchises, and all other enumerated property. The statute provides that they shall tax the whole franchise, and the Court finds that, and refers to the fact that they were exerting these things that were not anything but franchises over two States and half a Territory, and that the tax covers that.

I should be glad to know on what principle, when we look the thing in the face and find what has been done, it can be maintained that the State has the power to do that, unless it has the power by name to tax the transmission of property from Ogden to San Francisco, because the taxing of the right and the business of doing that under the apt name of franchise is no sounder in point of law than the taxing of the thing itself by some other descriptive words, and there is no escape from it.

The only trouble is that my learned friends on the other side (and with great respect, in the original hearing in the Court below, this distinction was, I think, not attended to) have forgotten the full effect as is now found here, that under the laws of Congress, not under the laws of California, (and I do not care if it was under both,) this road is now carrying on this business over two States and the half of a Territory, and that that is what its franchise is—the right to do that, the privilege of carrying on that operation, and taking tolls for doing it. That is what the franchise is found to be, and it is not anything else. The being, the corporation, is the franchise of the corporators who compose it. A franchise is always an attribute, and not a being.

So I say with great respect that it does seem to me to be clear, when you look at the Constitution and law and the action of the State officers, without constitution or

without law, if you please, and to the finding of the Court in this case according to the truth, just as the Legislature said we should do, that the right to carry on the business as the laws of the United States have provided, that they may and shall carry on business between Ogden and the shores of the Pacific to the Golden Gate, is taxed by this State as a whole, as a right to do that thing, as well as the right to do the thing of transporting freights from Sacramento to San Francisco.

Mr. Justice MATTHEWS: Do you mean to claim that, so far as this company derives any franchise from the United States, even to be exercised in California, that that is not a subject of taxation in California; or do you mean that, having a franchise from the United States to be exercised between Ogden and San Francisco, that the whole value of that has been taxed in California, and that that is the wrong of which you complain?

Mr. EDMUNDS: I mean both, if your Honor please. I affirm the first proposition, that whatever this company is doing within the State of California, purely infra-state, that it gets the authority and duty to do from the United States, the State cannot tax. I mean, besides, on your Honor's second proposition, that if I am wrong about that, this case finds that the whole franchise of doing the whole business from Ogden to San Francisco has been included in one mass by this board of assesssrs, and that however it might be in the first case, it would be clear that they could not tax the exertions of the faculties that were derived from the United States in respect of commerce across the half of a Territory and the whole of two States. These are my propositions. I affirm both of them.

And if your Honors will only recall to your recollection this last case of the taxation of property as property, visible property—the case of Penniston—you will see that Mr. Justice Strong, speaking for the Court, draws clearly and explicitly the distinction that I am now stating, and says

here, as the truth was, that is, in the Penniston case, the State of Nebraska had not undertaken to tax the franchise; that it only undertook to tax the visible thing, the tangible property; and the mere fact that the company had a locomotive that hauled the United States mail, did not relieve it from taxation any more than it would if a private person had owned a locomotive that hauled the United States mail.

Mr. Justice FIELD: You say that the finding is that the whole franchise is taxed. I believe it says it is a tax claimed upon all of the franchise.

Mr. EDMUNDS: "All" and "the whole" are the same thing. I got the word "whole" from the law, from the code. There is no distinction between "all" and "the whole," I suppose.

Mr. Justice FIELD: They might separate them.

Mr. EDMUNDS: Yes, that is possible, but they did not. So that, if the distinction that the Court made in going so far as it did in the Penniston case (and I must say with great respect that I am afraid we shall see trouble from that by and by), in holding that the visible property of this corporation, doing business with and for the United States in the State, was liable to local taxation until Congress should interfere—in going that far, the Court most carefully and distinctly, with a stated and clear perception, thought they had reached the verge of State authority, and in distinct terms clearly pointed out the fact that the franchise was not included in that taxation.

Therefore I say, with great respect, that if you can only see the state of the case as the Constitution and the law and the administrative action of the authorities of California have placed it, and so far as the act of Congress and the finding in this Court is concerned—if you reverse this judgment and uphold the State authorities upon that point, you must say that the State of California has the right to tax the faculties that are being exerted in some respects (and they are indivisible for the purposes of this case; what they

could be as a matter of administration hereafter is another thing)—you uphold the right of the State of California to tax the operations that this road is exerting, not under the authority of that State at all, but under the authority of the United States, and not even in the State at all, but by and under the authority of the United States in another State and in a Territory.

And that is what they meant to do, because this whole business, unique on the face of the earth, was intended to be a device—a contrivance which should saddle a burden upon the people engaged in these operations out of proportion to everything that they do and everything that they are to do, for the benefit of the rest of mankind in that State, because they did not like the people thus discriminated against. That was what it was. So much for that.

Now I come to the other point, which I am to discuss briefly, and that is the question of equal rights under the Fourteenth Amendment. The Constitution of the State of California says this, and it is worth while to pay attention to what it says, because that is supposed to be its way of expressing its meaning with precision, in order not to get into the confusion to which Mr. Justice Miller called the attention of my learned brother on the other side. First is the definition of property, and the statement that all property should be taxed equally in proportion to its value, which is a sound and just proposition. Then the definition of what is included in the word "property"— money, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership, with a provision excepting growing crops, property used for school purposes, &c., which may be exempted. Then it adds: "The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to *bona-fide* residents of this State." As to mortgage debts, the deduction is made in another way.

That they have done, so that it is a part of the system and code of California. I have it here, but I will not take time to read it; that in respect to every citizen and inhabitant of the State of California who owes a debt not secured by mortgage (I leave out "deed of trust" merely to shorten my phrase), he shall be entitled to a deduction of all his debts from the debts that are due and owing to him. In the case of a mortgage or deed of trust, the debtor shall be entitled (that is the substance of it, I am not quoting the language) to the same deductions, from the same policy and motive of justice and fair-play, that he is in respect to the other things that are personal not secured by deed of trust or mortgage.

But in order to reach the absent mortgagee, the creditor who may reside in another State, a different device was resorted to; and that was the only motive for that, too, everybody must concede. I do not take any time to show that. In order to get that, they say you shall be taxed for your real estate, or any other kind of property, personal or anything subject to a mortgage or deed of trust, to the extent only of what it is worth after that mortgage debt is taken out of the sum of its value. This is a paraphrase, you understand, but I think it is a perfectly clear, honest, and true paraphrase. The Supreme Court of the State of California says that it is. It comes right around to the very same footing.

Now, then, the State has provided, by Constitution and by law operating together, that, in respect of all debts owing by the tax-payers of that State that are not secured by mortgage, a deduction shall be made from their credits to a corresponding amount. In respect of all debts that are secured by mortgage or deed of trust, whether upon realty or personalty, they shall be entitled to the same deduction, but in a different mode. That, I agree, is classification as we understand it.

Having, therefore, established the general rule, which is equal, then it says——

Mr. Justice BRADLEY: There is a little discrepance, perhaps, in your statement. Debts are to be subtracted from credits.

Mr. EDMUNDS: I thought I said that.

Mr. Justice BRADLEY: You said they were to be subtracted from the mass of assessable property.

Mr. EDMUNDS: I did not mean that. I beg your Honor's pardon for the slip of my tongue, if it had a tendency to mislead you.

Mr. Justice BRADLEY: If a man has no credits he gets no subtraction.

Mr. EDMUNDS: No, sir; but if he has a mortgaged debt, then he has a subtraction, although that is not to be deducted out of assets on the other side, but is to be deducted out of the valuation property against which the assessment is to go.

Therefore, I repeat what I was just saying, that we have the case now where the State itself, having provided this general scheme of equality and fair-play upon just principles that its Constitution sets out, finds that it wishes to make an exception in respect to certain persons. This is one instance in which it does not wish to have the burden of taxation borne equally by the property-holders and the debtors of that State. This is what my friend calls a classification of property for the purposes of taxation! And stated according to its clear and undisputed meaning in the Courts of that State and everywhere else, it is the bare and naked declaration that, while all the people of that State shall, in one form or another, by one classification or modus or another, have their taxation relate at the same rate to the mass of the property that they have, less the debts that they owe, including case of common debts, credits, and in respect of mortgages, without

regard to that, there is one set of persons in that State upon whom that beneficent equality shall *not* rest.

It was suggested that this was a statement that a particular kind of property is not entitled to this deduction because it is railway property, or milling property, or whatever it is. If it were so, I should deny that the State of California, or any other State—if the Fourteenth Amendment applies to the limitation of the powers of a State in regard to taxation in respect to equality, or to taxation at all—would have the right to say that the property of the farmers, the farms in one county, or the farms in two counties, should be taxed at their full value, while the farms in all the other counties of the State should only be taxed at half their value.

I should deny that, and deny it stoutly, and should state it only as the best argument that I can make, that if the Fourteenth Amendment really applies to taxation by a State at all, such taxation invades it. The taxation of things and of property, as this general California scheme is, and sets out to be, is one thing; the taxation of an occupation and business is another thing. And while I am not here to deny that it is within the competence of any State to tax the occupation of lawyers, what I say is, if they say that the lawyer who practices in two counties shall pay a tax on his house double that on the one who practices in one county, that it would not do. And if this corporation is an association merely of persons who are entitled to protection (which your Honors have kindly relieved us from discussing), then the case is precisely as if five persons by name were mentioned in this Constitution of California, and saying that those five persons so associated shall not have the benefit of the deduction of debts from their taxable mortgaged property that the other people had absolutely, in the first place; and in the second place, if they own property in two counties, and do not own it in one, while other people, as this case finds, own precisely the same

kind of property, devoted to precisely the same kind of uses, carrying on precisely the same sort of operations, are entitled to relief, and receive it, as the case finds, what sort of classification is that that is to uphold this monstrous injustice, I should be glad to know?

The State of California says that, in respect of the property of railroad and other *quasi*-public corporations, there shall not be this deduction. It does not say that, in respect of property that is used for railroads, the railroad property, there shall not be this deduction. That may possibly be claimed to be a classification. But in this case the other people that this case finds merely as an instance to illustrate a vast mass of them, that the private persons who are not associated together, and who are not called a corporation, who own and operate railroads in two counties or in one, are entitled to receive this deduction and equality of protection that the law gives to everybody else.

It is, therefore, as the law of the State says in terms, and as the fact is found out to be, *not on account of the nature of the property, but it is on account of the nature of the being to which they impute the ownership of it.* This is what it is. And there is no escape from it, unless you violate the very language of the Constitution itself; and, having done that, you cannot escape from the fact that the State authorities, in administering their law and Constitution, put the construction upon it that I do, and that the private persons who are operating railroads in two or more counties of the State, or every other kind of *quasi*-public exertion, not corporate, but doing the same thing, are entitled, and universally, to the same equality of deduction, taxation, and burden that the rest of the people are and that these are not.

Oh, but, says the gentleman, that is on account of the fact that the railroad corporation gets a peculiar privilege. It is a monopoly, and the State, having conferred this peculiar privilege and monopoly, may tax it. Granted that it could tax a peculiar privilege and monopoly, that is not what it is doing; and, secondly, it has not done it.

The laws of the State of California and its Constitution give the right to form corporations of every kind, enumerating whole vast masses of business, including railroads, and matters of common and absolute right, and the right of any five citizens or inhabitants of the State of California to proceed to organize and build a railroad from one county to another, or within one county, or wherever over the State, is just as absolute as your or my right would be if we were in the city of San Francisco to-day to drive out to the shore of the Pacific Ocean.

There is nothing left, therefore, of the idea of a peculiar and monopolizing privilege which is to be taxed to one citizen because he has got something that some other citizen cannot get. It is a common right, just as universal a right as a man has at common law, only that it requires five persons.

Would it be a good classification to say, speaking of private persons, that if five associated they should be taxed double on all their property, and if only four associated, they should not? Of course the idea stated is ridiculous.

More than that, too, if your Honors please. In the State of California, by its positive and express law, it does not require even the association of five persons to build a railroad anywhere, or to take private property anywhere by paying for it. The State of California by its laws in express terms provides for the condemnation, when any person wishing to build a work of a public character, a ditch, flume, or water-course, aqueduct, or railway, or whatever, may, without any corporate organization at all, proceed to use, as these people have, as the case finds, and they may exert the same and every power that a corporation can exert in Massachusetts, Ohio, or Vermont, condemning private property, and getting it for that use.

Where, then, is this privilege, this exclusive right, this monopoly, this franchise, as it is called, that this State undertakes to saddle with a double taxation? There is

nothing that this association of citizens of the State of California are doing under the name of this corporation that they cannot do as of right under the laws of California without any association at all.

And, therefore, referring to the other point again to illustrate this, the case is precisely the same, and not other or different, as if these gentlemen composing this corporation had no corporation at all, and the State of California undertook to tax them for carrying the mails of the United States, and the whole business of carrying the mails and business of commerce of the United States from Ogden to San Francisco. The corporate character, therefore, plays no part in this power at all under the laws and Constitution of California, except by this wicked and arbitrary edict, which says, because you are a creature of that nature, and not because of the nature of the thing you are doing or from whom you hold your authority, you shall be taxed double to everybody else. That is the case, and that is all I wish to say about it. The statement of it is the best argument I can make.

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Office Supreme Court U. S.
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IN THE

Supreme Court of the United States.

October Term 1887.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff in Error,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY,
Defendant in Error.

No. 664.

Oral Argument of Mr. Evarts on Behalf of the Defendant in Error.

(Delivered January 12, 1888.)

Mr. EVARTS said:

If the court please: Former arguments held here, and the indications from the court, and the deliberate ascertainments and promulgations of the judgments of this court on the boundaries and bases of our argument, have brought this subject within a very narrow consideration.

I shall address myself first to the question of the disparity of the exactions on this corporation in respect of its property, and the taxation of other persons subject to taxation in California.

We are not here to discuss general notions and maxims of law, of wisdom, of prudence, in regard to taxation. We are not to appeal to you on the only discrimination or limitation that our learned opponent was disposed to

admit applied to taxation; that is, that taxation, when arbitrary and wholly oppressive, was contrary to the principles of free government, and was therefore excluded; and that was the only limitation, and that was the narrowest boundary that, under the doctrine of the freedom of taxation to the States, or in its nature to any sovereign, it would admit of.

If we were only under the law and the regulation of these general principles, it would be very difficult to find a footing before the judiciary upon which any particular tax could be thus discarded, for it would hardly be a judicial question. If the absolute freedom was in the State or sovereign that laid the taxes, to impugn a particular tax only upon these wide and general principles of justice and equity, and free institutions and free government, the answer necessarily would be that if this freedom of taxation was not limited by any conceded arrangement of limitations, it could not be a judicial question whether those principles had been transcended.

It is in the arrangements of constitutions and of laws that fix what is equal and what is right and what is consistent with the general principles of equal government that the difference is made between absolute governments and free governments. And when the constitutions of free governments are left unrestricted, unregulated, and unprotected, except under those general principles that would apply if there were no constitutional and legal arrangements, then we are outside of judicial inquiries. It is quite true that now and then, in discussions of constitutional limitations and constitutional protections, either in the State judiciary or in this court, or in other courts of the United States, questions of this general nature are debated. But it will be found, I think, that these debates resolve themselves into an illumination or influence thus shed upon a judicial determination whether the impugned transaction is within

the protection of the Constitution and of the laws as established.

Taxation, in its very nature, as from its root in the Greek word *Taxis*, carries a notion of equality or rate, assessment, adjustment; for it is the arrangement or array upon which a gross burden laid by the State upon all its subjects is distributed for their contribution.

Following that idea, and finding how many opportunities of evasion, not necessarily willful or pernicious, except in consequences, might prevent this natural notion of adjustment, as being at the basis of all taxation, constitutional provisions have been introduced to limit and define the extent and range within which taxation may be free. And we are to discuss the question whether the tax, as actually laid upon these particular corporations, is upon the equal arrangement and distribution of taxation which is imposed by the Constitution of California. For, I submit, if it shall be found that the actual imposition laid upon these particular corporations does not conform in substance, in operation, in the measure taken from this corporation, as compared with the measure taken from the general mass of tax-payers, it must be held that there is a disparity.

But it may be said, as has been very judiciously observed by Mr. Justice Miller in the Illinois cases, it is a vain imagination that we can have an absolute equality and justice in this distribution of burdens. It may be, then, said, fairly enough for judicial purposes, that whenever, by administration or by application, incidentally—and in that infirmity which I have referred to as brought into notice by Mr. Justice Miller—it may be said that the absolute requirement of equality, in the sense of justice, may not preclude some inequality in the nature and diversity of situations. But when a court has brought to its notice the actual disparity; that the disparity has been planned and intended; that it arose out of a situation exciting motives and directing purposes and objects; and that, then, the only

protection of equality is to be found in a formal, modal inclusion, when in substance there is at bottom an absolute diversity and an absolute discrimination,—then, in distributing justice between the different tax-payers, and making their equality to conform to the general purposes of the Constitution, you are not to treat it as being merely an infirmity in the diversity of human affairs, and a disparity arisen only incidentally and administratively.

Either these corporations, for the purposes of taxation, and the people of California in general, for the purposes of taxation, are or are not within the protection of the fourteenth amendment. If they are, then we are to ascertain, by ordinary judicial methods and prudential considerations, whether the disparity exists. If the whole subject of taxation, resting, as we know, under a very large and necessarily independent possession of the subject by the States, in any of its forms, in any of its disparities, in any of its inequalities, in any of its injustice, is not within the protection of the fourteenth amendment, your Honors' jurisdiction over this topic would be lost. But this is not easy to say, when the court has held—and under its instruction upon this view we are proceeding with the argument—that citizens or inhabitants associated in corporations are, within the fourteenth amendment, persons to be protected, and in that sense the incorporations are to be regarded as persons within the fourteenth amendment. Then it is very difficult to draw any line between the protective equality secured by the fourteenth amendment against injustice in the form and administration of taxation of property among individuals which would not be comprehensive and efficacious in regard to the property of corporations.

As was very well pointed out in the argument at the former hearing, here, by my learned associate, Mr. Edmunds, there is no form of injustice and oppression in the experience of human affairs and matters of government

wherein more injustice and more inequality is produced than under the forms of taxation. If, then, this principle of protection which suggested the fourteenth amendment looks at certain descriptions of citizens that need vigorous protection from the United States judiciary, then it is needed, in regard to that class, in respect to taxation quite as much as in regard to any other rights. It would hardly do to say that this court could not protect a class at the South by reason of there being a regulation of taxation that was equal and just *among them* distributively; that there could be a different rate of taxation and administration in regard to whites that would be just and equal as *among them* as whites, but would produce an exemption to the whites and an oppression to the blacks.

The equal protection of law, then, that was to maintain an equality of the law in their protection would necessarily require that the taxation thus distributed between classes, thus made equal in each class, but unequal between the classes, should be excluded by the judgment of this court as an invasion of the equal protection of the law.

But if that be so, and in regard to taxation, due protection would not be exerted over the classes in the case I have now alluded to, it is very difficult to find, in the generality of the fourteenth amendment or in the necessary foundation of equality of taxation, any permission to exclude from the vigorous and active protection of this court any inequalities not based on a distinction between the races, but on a distinction between the owners of property or tax-payers, irrespective of a discrimination in race. Nothing can be found, then, that will deprive these corporations from the equal protection of the law in respect of taxation, short of a judgment of this court that the whole subject of equality in taxation, and protection against injustice, is not within the fourteenth amendment. I shall proceed, then, upon this idea, that the corporations in respect of taxation are to be treated as persons that are to be

protected against inequalities in taxation of those persons compared with other persons included within the taxation of the States.

And, dwelling but a moment, it is necessary to repeat what I insisted upon in the former argument, and which seems to be manifestly true, that the only ground and reasoning upon which, under this clause and under the original protective clauses of the Constitution, corporations are counted as persons, is that those corporations are all made up of natural persons, and it is but a form of property and of protection against invasions of property of such natural persons that the corporations are treated as deserving of and receiving protection. It is only on that ground that what was, perhaps, a more difficult proposition, the faculty of suing in the United States courts, these corporations were treated as *citizens* in that sense; that is, that citizens owning, investing, and employing their rights and properties in corporations should have that protection against State exclusive jurisdiction which was given to citizens of different States in every other form.

The reason that these corporations are to be protected at all is, that they are made up of natural persons, who, in a lawful combination consonant with the laws and policy of a State, unite, exercise, improve, employ, and make useful and profitable to themselves their own property. And when we are to approach these considerations of the constitutional provision and the actual taxation under the laws of California, we are to understand that it is all men and women and children whose property is in these combinations and organizations that are called corporations. The proposition of entity, of political body, of *tertium quid*, are all contrivances of the law in conservation and protection of all the rights of individuals that are united in these corporations, and not otherwise. All are advantages given for the public good, by which it shall be lawful to have certain operative, judicial entertainments of these corpora-

tions. But it is the property and the natural persons for which and for whom these organizations are contrived by the law, and for the use of the property and the enterprise of the natural persons that are protected through those organizations, and only through them.

Before there came to be formal, logical, perhaps general and philosophical directions, as to taxation, in constitutions, there was much larger opportunity of allowing freedom of taxation, without any judicial scrutiny that should subject them to a judicial approval or rejection. But when a State has undertaken itself to put in form and body its rules of equality and justice, which, in the judgment of the learned counsel who opened here so ably against us, would put as the sole protection against inequality in the Constitution, and to say what shall be the equality, and there shall be found an application of inequality in the face of those injunctions and of those regulations, it does become strictly a judicial question.

Now, is there anything clearer than that by the thirteenth clause of the Constitution of California an attempt was made, and apparently a very intelligent and very concise, but a very comprehensive and a very rational preservation of equality—equality in the burdens of taxation that should be borne by property; that there should be no respecter of persons on the part of the State, nor organizations, nor ownerships, nor uses, nor profits, nor any favor or disfavor of movements and enterprises that were in accordance with the policy and the interests of society, or those that were less favorable or less valuable?

Certainly the framers of this Constitution could establish a proposition of that kind. How have they said—

"All property in the State shall be taxed in proportion to its value, to be ascertained as provided by law?"

Its *value* is all that is open to law. Its ascertainment of value is all that is open to law. There is no power and

authority in law to make any distribution in regard to what property shall bear, nor as to what property is. For it is defined in the Constitution, after the specific enumerations, as everything that is capable of private ownership. The Legislature cannot interfere with that. Everything that is capable of private ownership is property, and the value of everything as property is the only estimation upon which distribution is to be made. All taxation is to follow property in proportion to its value, and nothing is left for legislation but to ascertain the value.

There is, then, in this fundamental provision no license, no opportunity, for looking at property in the face in any other aspect than what it is worth. You cannot look at it to see by whom it is owned. You cannot look at it to see in what uses it is employed, except as that bears on the question of what, in its mere dead property, is its value. If you have two ships that are to be taxed, they are to be taxed by their value as ships as they lie there, as the subjects of property and of sale or estimation. You cannot tax one ship more because it is used in foreign commerce, or another because it is used in coastwise navigation. If the project is a wise one and a possible one, then it is to be maintained in its true nature and efficacy, and without any abandonment of complete equality; and if this absolute constriction on the freedom of legislation on the topic should be abandoned, then it must be by a change of the Constitution.

There is nothing in this clause of the Constitution that exempts this property of these corporations that have received their franchise from the United States, and that have a description that answers the purpose of calling them corporations having their roads in two counties from the universality of equality that is maintained and absolutely protected by the clause I have read.

Now there comes in a clause of the Constitution that undertakes to do what? Not to ascertain values of this or

that piece of property upon the same principles and upon the same measure that are to include all other properties; that is, in the simple nature, as I suggested, of its value as it lies as property, without respect to ownership, to management, or to interests or objects for which it is employed. Under the next section—4—an arrangement is accepted of general application, by which a mortgage or deed of trust is to create an estate, for the purpose of taxation, in the lender of money or holder of the mortgage. And that covers this property as well; this proposition applies to all. There, to estates in a corporation like this, as well as any other, it provides:

"Except as to railroad and other *quasi*-public corporations, in case of debt so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed"—to the mortgagee.

In these cases, all of them by which this partition of estate is made, taxes levied are a lien upon the property, and may be paid by either party to such security; and that removes the objection of any necessity in inequality in levying or collecting taxes of this corporation or other railroad corporations. Because, if the tax is laid in respect of the property of these corporations upon the ownership of the corporation, after setting apart the mortgages and taxing the mortgagees in respect to the mortgage, the lien on the property that is there to be a subject of taxation is just as well secured in respect of the part that is adjusted for the mortgagees as for that adjusted for the corporation itself.

Now there comes a question of administration of taxation under which arises an inequality: "All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner pre-

scribed by law." I am reading now from section 10 of article 13 of the Constitution, which is found in various citations in the briefs.

Let us understand what this is: "All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county," and so forth, "in which it is situated." That is imperative — the tax is to be assessed there, and "in the manner prescribed by law." It cannot be assessed anywhere else.

Now, what does this mean?—not to be technical. It means that the tax, in respect of inequality or equality, is in regard to its equal pressure upon property that is subject to the distribution, and that that is to be secured, firmly secured, by having the assessment made in regard to all forms of property in the locality where the taxation is to be laid and collected.

That is not a formal matter. Why was that put in the Constitution? In order that this equality of pressure might arise and be administered upon and among the tax-payers, so that they might know and understand and mutually support and protect one another in regard to the equality of the taxation.

Of course there is no protection of equality in regard to the burden that is to be raised from the whole taxable values of the State. That is not taxation. That is an estimate or measure of how much is to be borne.

The CHIEF JUSTICE: Do you claim that this railroad company, or each portion of the railroad company, must be taxed?

Mr. EVARTS: I do not necessarily apply it to them. I only point out what the discrimination is, and what the effect of that discrimination is, is yet to be shown. Now, as I have said, the estimate of what the whole State is to pay has nothing to do with taxation. That expresses what is needed; and then, when that is determined, taxation comes in, which is, that that mass shall be distributed and exacted

according to the measure of taxation provided, and not otherwise; and in the protection of the working of that equality, assessments are to be made local.

It is not necessary to insist at length upon the value of that protection. The only exception from that proposition in this Constitution—that legislation cannot possibly introduce diversity in assessment—is contained in what I shall now read:

"The franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State board of equalization at their actual value."

And that board distributes this mass of taxation between the several counties in proportion to the miles of road in each.

But here is at once a separation of the taxable power applied to these railroads, these designated railroads, these described railroads, that refuses that administrative protection of equality that is accorded to everybody else, and every form of property besides.

This is not a provision, as your Honors will be so good as to notice, that all *franchises* shall be assessed, (which is the operative word to determine how much tax shall be paid,) by this State board of equalization. No matter how many franchises there are, these State franchises have got to be taxed by the local assessment of the neighbors. If it is a franchise of the State, nevertheless, if that franchise is to be taxed, the measure of its taxation is lodged with the local assessors to determine it.

And so with all the other property that is supposed to enter into a combination of railroads that should make a distinction between that property, as property for taxation and value, from other property; all that, in its nature of roads, rights of way, rolling-stock, and all that—all that, so far as that comes to be a subject of classification—is not classified at all in this manner of assessing.

It is, then, nothing but description of certain railroads; and we see that this primary discrimination is made, and made not because it is railroad property, not because it is a franchise, for all other such property and all other franchises are left to local estimate and admeasurement of burden, but it is taking certain known and existing corporations that can find some formal—whimsical, I am almost justified in calling it—reason for making a ground of classification; for what is there in the nature of things that a railroad that runs from the boundary of one county to the boundary of the adjacent county cannot be taxed for the half that is in either of those counties by the assessors, that will measure it with all the property of taxpayers and under a distribution of burdens that is to be governed by this comparison presently, and by taxpayers there, consonant with the justice that has been provided by the Constitution?

No; no one can doubt that this disparity does not arise from any necessity in the nature of the corporation or its property. It is but a manner of picking out these corporations thus to be separately assessed by a different body, and by a body that does not apportion or assess taxes in respect to any person or any corporation else.

What, then, has this board of equalization, this taxing body, to compare its ratio and its measure of values with?—for that is what it all turns upon. The whole equality of taxation turns upon the equality of measuring property upon the same footing, in the aspect of value, with all the rest of the property of the State, and the practical mode I have shown you for securing that in regard to all other property. And then I find a designation, by description, that answers the purpose of taxing these railroads differently and by an irresponsible board in regard to its action being questioned by comparing it with other values.

It is not too much to say that this transaction thus contrived is not *taxation* of this corporation. It is an *exaction*

planned specifically and wholly for this corporation, and by a process that has jurisdiction of, and admits of correction by, no taxation of other property than that, and exaction means in its proper terms—not taxation, which is distribution, but exaction, which is arbitrary. This very word carries in its meaning an arbitrary requirement. None is better illustrated than in the language of the Scripture, as showing in what association the word "exaction" is used, and how distinguishable it is from equality: "Remove spoil and violence; take away exactions from my people."

Now the effect of this exaction is, that it is not put on any level with any other property. It is not committed to any board or administrative, distributive body that deals with anything else; and the only question is whether this is not, by care and purpose, a discrimination. And if the application of that discrimination produces the consequence of inequality, then it is effectually secured, because the scheme and plan of this discrimination was to strike at the very point, which is the assessment, and taking these corporations out of all the ordinary and permanent provisions of the Constitution itself, that the equalization should not be committed to any board that had to deal with any other rates. There is no correction, no possible correction, of the inequality of this taxation—none whatever. The proceeding of the equalization board does not deal with anything else. It takes these very corporations, and does not compare values with any other property with which it is to comport and to which it is to be adjusted.

Then it is a disparity serious and important. There is no remedy whatever of comparison with other property, because the judgment of this equalization board, in measuring the property here to be taxed, cannot be compared with the local authorities in their estimate of the values of the common mass of property that is taxed—none at all.

It is, then, a dislocation of equality that is provided for

tax-payers, in subjecting this corporation to an entirely independent method of measuring that is neither comparable with, nor is to be made equal with, any other taxation.

We will now look at what these properties are. They are properties, so far as we are concerned here, (and it is apparently the regulating motive of the taxation of which we complain,) which have been instituted and endowed and furnished with authority and power by the Government of the United States. It is very clear that when the United States undertook to provide for an arrangement of this organized system of transportation, whose large and multiform relations to society and the nation it is not necessary to insist upon, they found nothing in California but a portion of territory that needed to be included in the scheme of the United States. They did find besides that a corporation in existence had a right to build a railroad from the western to the eastern boundary of that State. That was not a special incorporation. It was a mere volunteer organization of citizens, with that faculty, under general laws of incorporation.

The United States undertook, not to build these structures out of the Treasury, and by the authority and administration of the Government; they undertook to attract capital and enterprise, and to interest all the people of the country. They invited them to contribute of their substance to accomplish these great results, and to incorporate their substance and their activity in this united structure. And they drew an immense contribution, and the United States furnished a very large contribution of their own. Twenty-five million dollars of loan and grants of immense tracts were their contribution, not to the State of California for taxation—not for this corporation out there that was bounded by the State lines—but as the basis upon which *they* were to furnish the contributors *their* inducement to come in, and to come into what? To come into this organization framed

by the United States for this entire and valuable system, instrumentalities, opportunities of wealth, and means of earning. That was done.

Was it to be imagined, can it be for a moment tolerated judicially, that contributions that had been made in the shape of subscriptions to the stock, or of money that has been loaned from private sources, and the immense first mortgage which the United States has permitted to be placed ahead of it—is it to be imagined, I say, that all of this was not under equal distribution of taxation, but under taxation by the State that was itself to be measured, and separately measured, only by its opportunity, or its sense of justice, if you please, in the exaction?

I do not now encroach upon the question of the franchise and the organization and the means being exempted from this State taxation. But I ask on this point alone that when the citizens at large of this country were expected to place their means at the service of the United States in carrying out this great enterprise which the nation itself declined to undertake, *eo nomine*, they had a right to suppose that either they were protected entirely from State taxation, or if they were exposed to State taxation, it was only in so far as local property there employed and used, and there imbedded in the general mass of property, and open to taxation only as a part of that general mass, that they were exposing their funds and their contributions.

Here you have a deliberate plan, under a form of classification of certain railroad companies, to wit—a classification of those that had railroads in two counties, (which I submit is but a formal designation not really governed by any such consideration as that they happened to be in two counties,) but on the mere consideration that they *describe* a set of corporations—to give an opportunity of taxation that might, to the general judgment and interest of the tax-payers of that State, prove satisfactory or even be applauded—a method of exaction from these bodies that was

not consonant with equality or justice, or with distribution on the general property of the State.

It comes to this, that by a separate power of admeasurement over this subject, and over nothing else, and by a distribution as to the mode of taxation in common ownership different from that which is applied to this in regard to deduction of mortgages, it is, in the sense I have stated, an *exaction* which is to be taken upon no basis of comparison, and by no administrative comparing, with any other tax.

And thus it goes, on this plan, that an *exaction* is to be taken from these railroads on these principles, and the residue required by the State is to be *apportioned* under the Constitution upon other tax-payers.

We all know that merely verbal directions are of no consequence. If you have in the very essence of equality no protection and no responsibility in regard to that equality, by having a board that deals with only one, and does not deal with the others, and, therefore, there is no opportunity of comparison, of adjustment or of correction, you have made a separate system which justly can be called, not a taxation in the arrangement of burdens, but an exaction upon independent considerations.

We do not need to *argue* that, if there is to be equality imposed in regard to the subjects of taxation, it is an inequality if in regard to some a deduction for debt is allowed and in regard to others it is not allowed. I can see no difference in the situation upon which the court had before them the establishment of that proposition in regard to the national bank taxation, and that here. The principle is the same. If there is an allowance for deductions from some and not from others, under a rule requiring equality, then it is a violation of equality that is to be corrected, according to law, if there is a tribunal to exert that power.

At least, it is plain that this difference does not arise from administration or from necessity, or incidentally, or from

the nature of property. It does not rest upon that at all. It is then a classification of persons, of owners, of forms of investment, which is not permitted by the Constitution at all; and that inequality is produced only for these corporations, and all other corporations, or other franchises, or other corporate organizations, are all to be treated as under the rule of equality, no matter what difficulties of administration there might be in securing it, but with such securities and such equalities as are possible.

So much, then, for the proposition of this being sedulously a separation and exaction measured only by the rule applied to this single body, and not applied to any other subject of taxation whatever.

The questions arising in the Illinois cases in regard to taxation were not looked at by this court merely to see and determine that there was a difference in the arrangements and situation of property in regard to the difficulties that might arise in assimilating the taxation for railroads with the general, common distributive mass. No! This court carefully looked into the regulation itself. You had displayed and argued before you the reason, the proposition, the shape, the manner in which this board of assessment in Illinois gathered together and looked in the face the property itself, in its detail, and adopted not a general and conclusive aggregate, but apportioned it upon principles of equality, of estimating what the stock was worth and what the secured debt was worth, and combining them and holding them up, therefore, as under scrutiny and comparison with the system of getting at the true proportionate values and taxable assessment of other property-owners of that State.

And Mr. Justice Miller, expressing the opinion of the court, comes to the conclusion that this is an investigation and a faithful one, and that the details and opportunities of comparison of equality with other tax-payers were given, and it was pronounced as being as near an actual ratable distribution as could be obtained.

Now, here nothing is displayed, nor is there any such system here. Give us a taxation that first undertakes to find out what the value of the stock of these corporations is, subject to the previous burden or mortgage; then what the debts are worth in the hands of their holders. And then combining them, if you please, as matter of taxation, you have nothing left but the question of distribution, which we say is then obnoxious to the charge of inequality by not dividing the burden.

But here you have directly and only before you a conclusion of the board that so many millions of dollars are by them named as the tax that is to be paid on the entire franchises and road-bed and other described property, and nothing less.

Of course the regulations in Illinois—the constitutional provisions—were different from those of California, and not so thorough and comprehensive, theoretically, as we have here, at least. But you looked at it. And now I proceed to the question of including in this taxation the franchise.

What is a franchise in California? As I had occasion to point out in my former argument, so long as privilege and prerogative were imparted by legislative or sovereign act in favor of some persons and not in favor of others, it was an item of property; it was a value; it was something that some persons possessed and other persons did not possess. And the faculty thus imparted gave to the fortunate recipients a measure of value that did not belong to property otherwise enjoyed.

But what is the law in California and the Constitution? We have all in our States fought against this kind of privilege and prerogative. We have tried to arrange by law so that whatever right there was and could be accorded should be accorded of common right. And in that State not only is it made a matter of common right to you and

me, and so many others as required to combine, to take these faculties as a matter of common right, and not of privilege or prerogative. No man can have it and another man have it denied him. All can have it. It no longer, therefore, becomes a franchise that is taxable in the sense of its being a privilege that can be measured by a State as accorded or not accorded, according to its favor, and the bonus of premium it would exact. All that has passed out of the law of California and of most of the other States.

But more than that: In California a private person is accorded by the Constitution, and the laws in pursuance of it, with the privilege of eminent domain, and of all that makes a part of the occasions and needs of a hundred methods which require this exercise of eminent domain, so that the great form (for it is nothing but form now) of its being a corporation, to those caring nothing for the facility of managing, combining, or governing by majority, is a mere arrangement of legal faculties that are given as of common right to manage property.

Now, as I say, an individual has a right to undertake, himself, the most, if not all these recognized forms of useful performance in the interests of the public, or in the faculties that belong even to a corporation, as I have said, not at the option of a corporation, but of individuals.

It is said that in this great mass of taxation this franchise of this State can cover any measure of exaction that you please. It must be unlimited, because there is nothing to compare it with. If all these corporations and these franchises can be included, not upon any principles of what franchises, as franchises are to be measured as property in common use by all that undertake to combine under that form of corporation; if, under this mere right to count a franchise of this State as of this measure or that measure, and all the property may be taxed not in accordance with justice and equality as towards other property, but yet the franchise is to crown it all and justify what must otherwise be regarded as arbi-

trary, (and is arbitrary under this method of administration, if it is not comparable with any other road or any other measure,) then you have this whole matter of separate taxation and its validity turning upon what, under the laws of California, would seem to be but a mere imaginary value as special property, because it is a property that every one may possess and enjoy.

I agree it is property. When it is brought under the organization, under the arrangements and the uses, it may be taxed. But it must be taxed as property as it lies and in its value, on the same basis upon which other values are levied.

And now for this question of what the franchise is that can thus be taxed. You will observe that in the requirements of information to be laid before this board on the part of these railroads, the matter included is thus laid out for taxation in section 3664 of the Code. I read from pages 12 and 13 of the Attorney-General's brief, where this section is set forth, and it is not included in some of the other briefs:

"SECTION 3664. The president, secretary, or managing agent, or such other officer as the State board of equalization may designate, of ANY CORPORATION, and EACH PERSON OR ASSOCIATION OF PERSONS OWNING OR OPERATING ANY RAILROAD IN MORE THAN ONE COUNTY in this State, shall, on or before the first Monday in April of each year, furnish the said board a statement, signed and sworn to by one of SUCH OFFICERS, OR BY THE PERSON, OR ONE OF THE PERSONS, FORMING SUCH ASSOCIATION, showing in detail for the year ending on the first Monday in March in each year—

1. The whole number of miles of railway in the State, and, where the line is partly out of the State, the whole number of miles without the State, the whole number within the State owned and operated by such corporation, person, or association.

2. The value of the roadway, road-bed, and rails of the whole railway, and the value of the same within the State.

3. The width of the right-of-way.

4. The number of each kind of all rolling-stock used

by such corporation, person, or association in operating the entire railway, including the part without the State.

5. Number, kind, and value of rolling-stock owned and operated in the State.

6. Number, kind, and value of rolling-stock used in the State, but owned by the party making the returns.

7. Number, kind, and value of rolling-stock owned, but used out of the State, either upon divisions of road operated by the party making the returns, or by and upon other railways.

Also showing in detail for the year preceding the first of January—

1. The gross earnings of the entire road.

2. The gross earnings of the road in the State, and, where the railway is let to other operators, how much was derived by the lessor as rental.

3. The cost of operating the entire road, exclusive of sinking fund, expenses of land department, and money paid to the United States.

4. Net income of such year, and amount of dividend declared.

5. Capital stock authorized.

6. Capital stock paid in.

7. Funded debt.

8. Number of shares authorized.

9. Number of shares of stock issued.

10. Any other facts the State board of equalization may require."

It is obvious that in demanding and receiving this statement from these corporations this board has laid before it all their operations and requirements. It is not, therefore, a question of the value of the things that are within the State. The elements are required of what belongs to this corporation outside of the State everywhere, its whole operations and its whole earnings, and the opportunities thus given under the name of a franchise which is included by the constitutional clause and by the statutory arrangement of taxing by bringing in a franchise of this whole establishment.

Mr. EDMUNDS: And by the taxation itself?

Mr. EVARTS: Yes, and by the taxation itself. The measurement is given for the whole. It is, therefore, put upon an entirely different footing from any other taxation which has nothing to do except with the dead value of a piece of property. Everywhere else that is so. But now it is the organization; it is the opportunities of earnings—the actual earnings, the occasions, the property from Ogden to San Francisco. And that is exacted, and out of that is made a mass of its debts; all that are its payments except those for the sinking fund and the money paid to the United States and cost of operating; all that is excluded, and out of that comes an entirely undistributive and unsecurable result drawn of the mere will, with no comparison possible of what shall be put down, and they can put it down at what they please.

Now, how much in the estimation of the aggregate, including the franchise, may the franchise itself be taxed? I ask your Honors' attention to the very pertinent observations of Mr. Justice Miller in the Illinois Railroad Cases; he shows how much a franchise could be taxed in the nature of its faculties when the material property was of no value. I read from pages 606 and 607 of that very long case:

"It is unable to pay any interest on its bonds. Its capital stock is of no value. The company is insolvent and in the hands of a receiver. But the board of equalization assessed the capital stock and franchise at $2,003,415, and its tangible property at $2,629,367, thus assessing a property which pays but little, if anything, beyond its running expenses at the sum of $4,632,782.

"This sounds plausible; but it is nothing more. Concede for the present that the capital stock is sunk and is of no value; concede that the funded debt of the company has at present no market value, or is unsalable,—there remains what is valued as worth over $2,600,000 of real and personal property, which, like all other property of individuals or corporations, ought to pay its proportion of the public burdens."

That, of course, we all understand—that the property is to pay a tax whether it is burdened or not:

"There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value; that the holders of it attach no value to this franchise?"

And enlarging upon it with very great clearness of illustration, it proceeds in the final result to this:

"It is this franchise which the Legislature of Illinois intended to tax, which it had a right to tax, and in taxing it committed no injustice, if it was fairly assessed, though the corporation which holds it may be so utterly bankrupt that it must necessarily pass from it into other hands. In those hands, disembarrassed of its overweight of debt, who shall say that it is not worth $2,000,000? And who shall say that such is not the real value now of this franchise?"

Now this I refer to only as showing how large a range is open upon mere estimate of present or future values of a franchise or expectations, rational expectations, if you please, of some upshot in the matter some time or other. It is only on that point—in the largeness of the just measure, perhaps, that may be put on the prospective or hoped-for value of a franchise.

If it be true, then, that so large a range of opportunity for a just measure of franchise under this legislation, under this Code, under this Constitution, which has undertaken to say that nothing but property shall be taxed, and only on value shall be taxed, is it to be said that a corporation situated as this, with a great debt, without any dividends of any value to its shares, if you please, or, at any rate, of any full value, and all this open property to be taxed, which we understand is to be properly taxed separated from franchise, organization, uses, and means—is it to be tolerated that under the name of franchise this corporation is subject to the taxation of the State of California, and the United

States Government is subject in its means and in its instrumentalities which it has organized, and in its own debt, which it holds and has used as a means for building the road, that that franchise is to be exaggerated and measured by the largeness of this great enterprise organized by the United States, and having its value, if it has any, not in its being a local, California corporation, (and its franchise is not taxed, therefore, there as a California taxation on a level with other franchises at all,) but there is, therefore, this connective value, means, enterprise, instrumentality, earnings, obligations, as well as opportunities towards the United States to be estimated and taxed?

We have, in a recent decision of this court in the Sinking Fund Cases, a very clear conclusion, as it seems to me, in the opinion of the majority of the court as pronounced by the learned Chief Justice, in which it is summed up, as I understand, that for the purpose of equal domination on the part of the United States over the Central Pacific road, with its domination over the Union Pacific, these franchises and faculties imparted to and used by the Central Pacific, notwithstanding it had an origin of an organization of the State, was on the same footing in all regards, for the purposes then under discussion, of course, only, that the Union Pacific was. After stating how narrow was the basis upon which the California corporation rested when the United States took hold of it, the learned Chief Justice said:

"By the act of 1862 Congress granted this corporation the right to build a road from San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of the State, and from there through the Territories of the United States, until it met the road of the Union Pacific Company. For this purpose all the rights, privileges, and franchises were given this company that were granted the Union Pacific company, except the franchise of being a corporation, and such others as were merely incident to the organization of the company."

And summing up, then, the further considerations which bring into view the whole body of the legal relations, he continues:

"Under this legislation we are of the opinion that, to the extent of the powers, rights, privileges, and immunities granted these corporations by the United States, Congress retains the right of amendment, and that in this way it may regulate the administration of the affairs of the company in reference to the debts created under its own authority, in a manner not inconsistent with the requirements," &c.

For the purposes of the domination of the United States over the Central Pacific, it was given these functions, these faculties, these means, these instrumentalities, and these franchises as they came from the United States to this corporation, although it had a native faculty of being a corporation—which we have shown was no privilege at all, but the mere common right that everybody in that State had to be a corporation. Can you refuse to deny this method selected for taxation, and decide that necessarily taxation has been withheld from this franchise that, in the language of the court through the Chief Justice, has made it all substantially that it is—all that it is in its duties, powers, means, wealth, and opportunities of gain, all proceeding from the United States, and all, therefore, place it under the same subjection to the administration of its means, and the exaction of its debts to the United States that belonged to a corporation that originated, as the Union Pacific did, from the establishment by the statute of Congress?

Unquestionably, then, unless the Union Pacific could be taxed on its franchise by the States through which it passes—unless these franchises of the United States that have been joined with, and have swollen the wealth, the revenues, the taxable property of this local corporation of California—unless they are open to unlimited taxation by the State of California—it is impossible that this court

should hold valid this taxation, as it has embraced the whole mass, (including these franchises separated for taxation from all other California franchises,) separated from all organization of property, and administered by the State of California wholly at its will, without any reference to the relation of the United States in its organization, its means, and its instrumentalities, without reference to the twenty-five million dollars of debt that is due to the United States, and that now year by year, under the taxation of California, is postponed to that extent by the first burden of taxation extracted from it, and that burden is exaggerated and measured by the faculties that the United States itself has imparted to these corporations.

No; there is no getting around the fact that this State taxation can only be sustained, if at all, because the United States adopted this corporate faculty, (the company and corporation,) it has made itself the master of these instrumentalities and means for taxation, and that the State maintains its control and domination over the incorporation, which has itself been enveloped and smothered, one may say, in the great faculties imparted by the United States. Unless you can hold that, you must hold that the taxation as now presented to you is not valid because it does include a taxation of wealth, resources, means and subjects, and of obligations to the United States, usurps control and impediment over and against all these by this taxation.

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CALIFORNIA RAILROAD TAX CASES.

Argument of CREED HAYMOND in the Supreme Court of the United States,

JANUARY 12th AND 13th, 1888.

REPORTED BY

JAMES L. ANDEM,

STENOGRAPHER,

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1888

should hold valid this taxation, as it has embraced the whole mass, (including these franchises separated for taxation from all other California franchises,) separated from all organization of property, and administered by the State of California wholly at its will, without any reference to the relation of the United States in its organization, its means, and its instrumentalities, without reference to the twenty-five million dollars of debt that is due to the United States, and that now year by year, under the taxation of California, is postponed to that extent by the first burden of taxation extracted from it, and that burden is exaggerated and measured by the faculties that the United States itself has imparted to these corporations.

No; there is no getting around the fact that this State taxation can only be sustained, if at all, because the United States adopted this corporate faculty, (the company and corporation,) it has made itself the master of these instrumentalities and means for taxation, and that the State maintains its control and domination over the incorporation, which has itself been enveloped and smothered, one may say, in the great faculties imparted by the United States. Unless you can hold that, you must hold that the taxation as now presented to you is not valid because it does include a taxation of wealth, resources, means and subjects, and of obligations to the United States, usurps control and impediment over and against all these by this taxation.

127-1

CALIFORNIA RAILROAD TAX CASES.

Argument of CREED HAYMOND in the Supreme Court of the United States,

JANUARY 12th AND 13th, 1888.

REPORTED BY

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1888

CALIFORNIA RAILROAD TAX CASES.

The Fourteenth Amendment.—The Taxing Power and its Limitations.—The Means and Instrumentalities of the National Government cannot be Taxed by the States.—The States cannot impose Taxes or Burdens upon Interstate Commerce.

Argument of CREED HAYMOND in the Supreme Court of the United States,

JANUARY 12th AND 13th, 1888.

RAILROAD TAX CASES.

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Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 664.

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF IN ERROR,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY,
DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This action was brought in the superior court of the city and county of San Francisco, State of California, for the recovery of certain county and State taxes claimed to be due from the Central Pacific Railroad Company under an assessment made by the State board of equalization upon its franchise, roadway, road-bed, rails, and rolling-stock.

The amount claimed is three hundred and seventy-five thousand thirteen and $\frac{47}{100}$ ($375,013.47) dollars.

This case was removed to the circuit court of the United States for the district of California, and there judgment was rendered in favor of the defendant.

The case in this Court stands upon the pleadings and findings, and all of the questions involved are thereon raised.

The answer puts in issue all the material allegations of the complaint and sets up various special defenses. With the exception of a plea of tender, all of these defenses would have been available under the denials in the answer.

The case made by the pleadings and special findings of fact is as follows:

On the 28th of June, 1861, a corporation was formed and organized under the laws of the State of California under the name of the Central Pacific Railroad Company of California. The purpose of its formation was to construct, own, and operate a line of railroad and telegraph from the city of Sacramento to the eastern boundary of the State of California.

On the 1st day of July, 1862, the Government of the United States undertook to procure the construction of a line of railroad from the Missouri river to the Pacific Ocean, and to that end Congress passed act entitled "An act to aid in the construction of a railroad from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes."

U. S. Statutes at Large, vol. 12, p. 489.

By the act certain persons therein named were erected into a corporation, under the name of The Union Pacific Railroad Company, and that corporation was authorized to construct, own, and operate a line of railroad and telegraph from the Missouri river to the western boundary of Nevada Territory. By this act, the more certainly to secure the completion of the road, Congress authorized the Central Pacific Railroad Company of California to construct a road on that part of the route which lay between the Pacific Ocean and the eastern boundary line of the State of California, and conferred upon that corporation the same powers and clothed it with the same privileges and immunities which it conferred upon and clothed the Union Pacific Railroad Company with.

On the 2d of July, 1864, Congress passed another act amending the act of July, 1862, and granting additional aids and authorizing the Central Pacific Company to build east of the California State line and until it met the line of the Union Pacific.

The declared intent and purpose of Congress in passing these acts was to secure the completion of a railroad from the Missouri river to the Pacific Ocean, and to secure the use thereof for all time to come to the Government of the United States for the transportation of its mails, public stores, troops, and munitions of war, and to require said line, so far as the public and the Government were concerned, to be operated as one connected, continuous line.

In 1870 the Central Pacific Railroad Company of California and the Western Pacific Railroad Company formed themselves into one corporation, under the name of the Central Pacific Railroad Company.

The Central Pacific Company constructed a line of road from the city of Sacramento to a connection with the Union Pacific railroad at a point near Ogden, in the Territory of Utah. Both companies complied with the several acts of Congress, and there is now in operation a continuous line of railroad from the Missouri river to the Pacific Ocean.

When the present action was instituted against this company, and at the time the assessment in question was made, the United States had and now have a lien, created by the acts of Congress of 1862 and 1864, of about twenty-seven million of dollars, with a large amount of interest, upon its rolling-stock, fixtures, and franchises, and there are also outstanding bonds of about the same sum, issued by the company prior to January 1, 1875, and secured by a mortgage upon the same property. There was also at that time and still is a mortgage upon the lands granted in aid of the road. These lands are not and have never been in any way connected with the railroad business of the defendant. They are agricultural and grazing lands, held, owned, and used

for farming and grazing purposes. All of these lands to which they had obtained title were, in the years 1880, 1881, 1882, 1883, and 1884, assessed by the assessors of the respective counties in which they were situated at their full cash value, and no deduction from said value was made or allowed on account of the mortgage or the indebtedness secured thereby. On the contrary, the laws of the State of California under which the assessors acted in making such assessments prohibited any such deductions from said values on account either of the mortgage or the indebtedness secured thereby. In each of said years the defendant paid in full, at the time the same became payable, all taxes levied upon said lands, amounting, in the aggregate, for State, county, and municipal purposes, to over one hundred and thirty thousand dollars.

The laws of the State of California then and ever since in force provide that in the assessment and valuation of lands of like character and situation and in every respect similar, both in quality and use, not owned by railroad or other quasi-public corporations, a mortgage thereon by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, and that in the assessment and valuation of such property for the purposes of taxation the value of said debts shall be deducted therefrom and the owner of said lands or property only assessed and taxed for the value in excess of the value of such debts.

From the findings it appears that on the 15th day of August, 1885, the State board of equalization (folio 110) made a pretended assessment, for the purposes of taxation for the fiscal year of said State then next ensuing, upon the franchise, roadway, road-bed, rails, and rolling-stock and *property* of said railroad against defendant.

This assessment was not made separately upon the franchise, roadway, road-bed, rails, and rolling-stock or any properties of said railroad, but all of said properties were blended.

This is the assessment upon which the several taxes mentioned in the complaint were based. This assessment included all property and kinds of property mentioned in section 3665 of the political code of California, as amended March 9, 1883, except depots, stations, shops, and buildings erected upon the space covered by the right of way, which last-mentioned property was assessed, as provided in said section, by the local assessors, and except steamboats.

Section 3665 of the political code of California, as amended March 9, 1883, provides, among other things, that the State board of equalization must meet at the State capitol on the first Monday in August and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the board must assess the franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county. Assessment must be made to the corporation, person, or association of persons owning the same *and must be made upon the entire railway within the State, and must include the right of way, bridges, culverts, wharves, and moles* upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road.

The depots, stations, shops, and buildings erected upon the space covered by the right of way are assessed by the assessor of the county wherein they are situated.

The assessment involved in this case included all the property and kinds of property mentioned in section 3665 of the political code except depots, stations, shops, and buildings erected upon the space covered by the right of way, which last-mentioned property was assessed, as provided in said section, by the local assessors, and except steamboats.

Finding 21, folio 111.

The assessment in question included not only the franchise, the roadway, the road-bed, rails, and rolling-stock of the

company, but also included wharves and moles upon which the track was laid.

Section 10 of article 13 of the State constitution of California provides that all property except the franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in the State shall be assessed in the county, city, city and county, town or township, or district in which it is situate, in the manner prescribed by law.

The laws of the State prescribe that all property except that above mentioned shall be assessed in the county in which it is situate by an assessor elected by the people of such county.

The pretended assessment made by the State board of equalization and the tax claimed is upon all of the franchises, the existence and OPERATION of defendant, and upon all the franchises and corporate powers held and exercised by defendant, as well as its right TO EXIST and TO OPERATE.

Finding 30, folio 120.

It is also found (finding 22, folio 111) that the State board of equalization in making such assessment pretended to assess to and against the defendant the full cash value of said railroad, roadway, road-bed, rails, rolling-stock, and franchises, as described in section 3665, without deducting therefrom the value of the debts or any part thereof secured by the mortgage given and existing thereon.

And again (folio 112) that the State board did not treat said mortgages as an interest in the property, but assessed the whole value of the property to the defendant in the same manner that it would have done had there been no mortgage thereon.

It is averred in the answer (folios 23, 35, and 36) and found as facts (folios 104, 115, and 116) that many of the bonds secured by the mortgage upon the road "now are and ever have been owned by citizens and *bona fide* residents of the

State of California;" that the local assessors for each of the years since the adoption of the State constitution of 1879 "have assessed to the owners and holders thereof (holders of said bonds) the indebtedness of the defendant secured by the mortgage herein mentioned, but never have, nor does the law permit them so to do, made any deduction from the assessment of any of the property of this defendant on account of the assessments made to the holders of such indebtedness."

It is averred in the answer (folios 36, 37, 38, 39, and 40) and found (folios 116, 117, 118, 119, and 120) that at and before and ever since the adoption of the constitution of California now in force there were and are existing under the laws of said State corporations of various kinds, formed for the purpose of and actually operating and doing business and holding and using and operating property in more than one county in said State, and at all said times there were and there now are divers natural persons, residents of said State, operating property in more than one county in said State and at all of said times there were and now are railroads owned by corporations formed under the general laws of said State, and also by natural persons, which are only operated in one county. By the provisions of section ten of article XIII of said State constitution persons operating railroads in more than one county in the State have been singled out from all other persons operating property in more than one county and denied the right, common to all other persons, to appeal for relief from overvaluations of their property by assessors to the local board of equalization, and denied the rights and privileges accorded by the laws to all other persons in that respect.

Corporations in said State of California now are and ever have been formed under general laws relating thereto, and railroad and all other corporations, except public corporations formed or organized for the government of a portion of the State, now are and ever have been designated by the laws of California as private corporations. Under the pro-

visions of the laws relating to the formation of private corporations such corporations may be formed for any purpose for which individuals or natural persons may lawfully associate themselves together; and there now exists in California, and ever have existed, corporations formed under said laws for fire, marine, mutual life, health, and accident insurance, building, constructing, and operating railroads, wagon roads, telegraphs, bridges, ferries, wharves, chutes, and piers, and for constructing and operating canals; for the purpose of acquiring lands in large tracts and distributing them as homesteads among the corporators; for savings and loans, for mining, for the sale and distribution of water in cities and towns for manufacturing, mechanical, and agricultural purposes; for benevolent, charitable, and educational purposes; for cemeteries, agricultural fairs, and various other purposes.

In the State of California there now are, and for more than three years last past have been, various railroads owned, operated, and controlled either by individuals, partnerships, or by private corporations other than railroad corporations, to wit, by mining and manufacturing corporations. There is now, and for more than three years last past has been, a railroad in use and operation extending from the city of Marysville, in the county of Yuba, to the town of Oroville, in the county of Butte, in said State, a distance of twenty-seven miles, which said road now is and ever has been operated in more than one county in this State, and is of the same gauge as the road of defendant, and has ever been operated for like uses and purposes.

Said road, with all its equipments, now is, and for more than three years last past has been, in the ownership and under the operation and control of one N. D. Rideout, a citizen of the United States and a resident of the State of California.

There now is, and for more than three years last past has been, a railroad extending from the town of Santa Cruz, on

the Pacific Ocean, and in the county of Santa Cruz eastward through said county and into the county of Monterey, to the town of Pajara, a distance of about twenty-one miles; that said road now is, and for a long time past has been, owned, operated, and used for like purposes for which the defendant's road is owned, operated, and used, and that the same now is, and for a long time past has been, in the ownership and operated by the Pacific Improvement Company, a private corporation formed under the laws of the State of California, which said corporation is not and never has been a railroad or quasi-public corporation; that there now are, and for more than five years last past have been, divers other railroads owned and operated in said State by corporations other than railroad corporations, and by individuals and partnerships, and that all said corporations, individuals, and partnerships are the owners of lands which are assessed by the local assessors of the various counties in which such lands are situated, and all are entitled under the laws of said State to the deductions provided for in said laws, and have been allowed such deductions.

From the answer it appears (folios 51, 52) that on the 10th of December, 1885, the defendant, while then denying all liability upon the pretended assessment, tendered and offered to the plaintiff the sum of two hundred and twenty-five thousand and eight dollars and eight cents ($225,008.08) in United States gold coin in part payment of the tax claimed, with an agreement that the receipt of such sum should not prejudice the plaintiff in any legal rights; and defendant brought the same into court and offered the same to the plaintiff and subjected the same to such orders or judgments as the Court might make in the premises.

ARGUMENT OF CREED HAYMOND

ON BEHALF OF THE DEFENDANT IN ERROR,

In the Supreme Court of the United States,

JANUARY 12th and 13th, 1888.

Mr. Wilson, of Washington, opened the argument for the plaintiff in error January 11th, and was followed by Mr. Edmunds and Mr. Evarts and Mr. Haymond for the defendant in error on the 12th and 13th, and the argument was closed by Mr. Johnson, attorney general of California, for the plaintiffs in error, on the 13th, and the case then stood submitted.

ARGUMENT.

Mr. HAYMOND said: If the Court please. As courts are not organized to decide abstract propositions of law, but only to determine cases properly before them and within their jurisdiction, it is always well at the outset to understand clearly what question is presented by the case before the court.

The arguments on the part of the State have taken rather a wide range. We have heard about taxing property according to its uses, about taxing it by its income, and about taxing business. There is no case here involving any such questions.

This was an action at law commenced to recover from these defendants three hundred and seventy-five thousand dollars claimed by the State to be due upon an assessment and upon a tax levied upon property according to its valuation. There is no question here, nor can there be any,

except as to whether the State is entitled to recover that amount upon the tax which it did pretend to levy.

The State might have had a right to lay and collect other taxes. It might have a right to commence an action to recover taxes so laid; but no such taxes were laid. There is here no case involving any such taxes.

We met the complaint in this case by a denial of all of its material averments. Under this denial, without any affirmative pleading, every issue which is presented to this court could have been presented. Before the State could recover it must have shown a valid tax levied upon property which belonged to the defendant, and upon property over which the board of equalization had jurisdiction.

We were entitled under the denial of our answer to introduce any proof and to have any finding which would show that the tax itself was invalid. As we might do under the rules of pleading and practice in that State, we, out of an abundance of caution, followed those denials by a further and separate answer, in which we set up the fact that this corporation was a corporation organized under the law of the State of California—I had come very near falling into the error of the learned gentleman who so very eloquently opened this case by saying a corporation *created* by the State of California. No private corporation was ever created in California by the State, nor could any private corporation ever have been so created. Their creation was prohibited from the very start. There are no such things, nor have there been any such things in existence in California as the corporations about which the learned counsel who opened for the State has been speaking.

There are associations of individuals in that State governed as partnerships are governed and as other associations are, not by law giving corporate rights, but by general laws, which are merely municipal regulations, and which, like all other municipal laws, are, from their nature, subject to altera-

tion, amendment, or repeal by the law-making power of the State government.

The CHIEF JUSTICE: That is to say, there are laws allowing the organization of a corporation with powers granted by general laws?

Mr. HAYMOND: Yes, sir; with powers regulated by general laws. Corporations are there formed under these municipal laws just as partnerships are formed.

The CHIEF JUSTICE: Your laws do not differ from those of other States requiring general laws to be passed for the purpose of organization?

Mr. HAYMOND: No, sir; except that the Constitution prohibits the creation of private corporations by this State.

The CHIEF JUSTICE: That is not peculiar to your State.

Mr. HAYMOND: I know it, but it is something new in legislation, and that is where many of these mistakes have arisen. In the separate answer we set up the grounds on which we claim this tax to be invalid, and then we introduced another defense which we might introduce in an action at law in our State, and that was an equitable defense.

That defense has not been passed upon, is not before this Court, and cannot come before you for consideration, except in the case that you should hold that the decision of the court below was wrong upon the legal issues and reverse the judgment, in which instance you would send it back to that court to have the equitable questions determined.

These equities I may as well briefly state here so that you will understand them. They rest on the fact that in the administration of this law a discrimination has been made, not such a discrimination as inevitable in the administration of tax laws, because exact equality can no more be obtained in the administration of tax laws than can exact justice be attained by the administration of human tribunals in other matter.

We set up to bring ourselves within the Cummings case and as an equitable defense all the matters and things which

it would have been necessary to have stated in a bill in equity against the tax collector to prevent the collection of these taxes; that the State board of equalization in making this assessment adopted a rule by which it valued all property in that State, except the railroad property of corporations, at less than its actual value, while in truth and fact it imposed upon the property of this corporation, under a rule which it adopted, and upon all railroads operated in more than one county, a system the basis of which was the valuation of such property in excess of its actual value; that as to such property it adopted and enforced a rule the result of which was unjust discrimination.

In order to bring ourselves within the protection of a court of equity, to give it jurisdiction, we were required, whether the tax was a legal one or not, to tender to the State that portion which in equity and good conscience ought to be paid.

Long before this action was commenced, as appears, we tendered, without prejudice to the rights of the plaintiffs in this case, the sum of two hundred and twenty-five thousand dollars, which was nearly one hundred thousand dollars more than this equitable defense shows the State was entitled to in good conscience and in equity.

Of course, that question is not here. That question could not come to the court below until after the legal questions were disposed of against us. It had to find that there was something for equity to operate upon. If the tax was a nullity, upon the very face of it, by itself, why, of course, there was no place for equity to rest its jurisdiction.

Mr. JUSTICE MILLER: Do you think you can go back there now and try that equity suit?

Mr. HAYMOND: We would be bound to go back and try it.

Mr. JUSTICE MILLER: You would be bound to go back to get it tried; but I do not know of any case in which it has been held that you can have two cases in one and the same court and take your choice which you will pursue.

Mr. HAYMOND: Those are matters of defense that may be used in defense of an action at law.

Mr. Justice MILLER: But you cannot do that in the circuit courts of the United States or anywhere else. You have to file a separate bill and abandon your common-law defense.

Mr. HAYMOND: That is a question, your honor, of course, for consideration. You have held here (though that exact point was not raised, and therefore it would not be authority) that such was the proceeding if there was an issue undetermined.

Mr. Justice MILLER: We have held that in the State of California you can do that—in your own courts. However, it does not make any difference.

Mr. HAYMOND: I was only stating the case.

The CHIEF JUSTICE: The question is now here upon findings of fact.

Mr. HAYMOND: That is true, but it is also true that we set up an equitable defense which has not been passed upon. It is also true that in our answer we set up the same facts as a legal defense, and that such facts have not been passed upon. By turning to the answer (Record, folios 11 to 14, inclusive) it will be found that as legal defense we denied all the averments of the complaint, and also referred to and made part of that legal defense the matters stated in the answer from subdivisions 3 to 36 of the answer, so that, as far as I can see, the case in this respect stands on all fours with the case of Supervisors *vs.* Stanley (105 U. S., p. 305), which case was sent back for a new trial because similar issues were not determined. I hope, however, that we will never come to that, and I will dismiss the subject.

Mr. Justice MILLER: We have not here the question now about steamboats and moles; other things were here. We have had them here three times, but could not get them brought up, and we have not got them here this time.

Mr. HAYMOND: All I desire to say is that I do not wish to be held responsible for that. We have attempted twice to get these cases here on the Federal issues alone, and each time the State has prevented.

This tax is sought to be collected and this suit was prosecuted under a special statute, which referred to the collection of these taxes alone, and which provided for practice in relation to this class of cases alone in the courts of that State.

We hold that there was no foundation for the action; that, these laws being special and prohibited by the constitution of California, the plaintiffs were not in court, and in suits begun last year, in form and manner like these and upon the same ground substantially, that question has been determined in our favor by the superior court of that State and is now before the supreme court of the State and faces this court upon the record in every one of these cases.

The CHIEF JUSTICE: What is the precise question which you say was decided?

Mr. HAYMOND: That the laws which provide for the collection of these taxes are special within the meaning of the words "special law" in the State of California. I am aware that counsel on the other side have cited authorities from other States as to what constitute special laws, but special laws in the State of California were well understood before the adoption of this constitution, and are a very different thing from what they were interpreted to be by the courts of some of the other States.

Under these special laws, and under special laws alone, these taxes were sought to be collected and these proceedings had in the courts below. These special laws have been held to be unconstitutional by the superior court of that State (as, in my judgment, they clearly are), and that question is before you upon the record in each case here.

The CHIEF JUSTICE: Was that question made in the court below?

Mr. HAYMOND: It was not argued; it was made. It arises on the record. It is a jurisdictional question.

Mr. Justice MILLER: Did you demur to the bill?

Mr. HAYMOND: No, sir; I do not think there was any demurrer; but we cannot waive a jurisdictional question by failing to demur.

The CHIEF JUSTICE: I do not understand exactly how it is a jurisdictional question. This is a suit brought by the State against a railroad company to recover taxes.

Mr. HAYMOND: Certainly it is. The laws providing for the collection of these taxes are void, and the State is not entitled to collect them. These laws differ from the general laws of the State in relation to taxation. But I will come to that more fully hereafter; I am only stating it generally now.

THERE IS NO CLASSIFICATION OF PROPERTY.

I have listened with a great deal of attention to the learned argument of my brother Wilson. If the premises were correct it would seem that the conclusion must follow; but from the very beginning of this case an attempt has been made to make of this constitution something which it was never intended to be. No man engaged in framing this constitution ever dreamed that the convention was attempting a classification of property. That is an invention.

There has been an attempt here to place a new construction upon the words used in it, and an entire misapprehension of the purposes and intent of that constitution has been presented to the Court in this argument. They have been driven by the necessities of this case to say that that constitution classifies property; that it divides the different interests of parties in the same property, and that there has been and is no question of the deduction of values from one man's property and a denial of that deduction from another man's property; yet that is the word used in the laws passed to carry it into force. Section 3650 of the political

code and all the sections use the same term. That section says:

"When any property, except that owned by a railroad or other quasi-public corporation, is subject to or affected by a mortgage, deed of trust, contract, or other obligation by which a debt is secured, he must enter in a proper column the value of such security and deduct the sum."

It is made the duty of every county recorder of the State of California to certify to the assessor, in order that this may be done, a transcript of all the mortgages and deeds of trust upon record. The assessor is forbidden to make this deduction only in the case of the railroad property which he enters upon his assessment rolls; that assessment is transmitted by the State board to the assessor; he enters it upon the assessment roll, and the law is that in every instance except in that instance this deduction shall be made.

Wherever the question is treated it is treated not as a classification, but as a deduction from the value of the property itself.

THE SO-CALLED CORPORATIONS OF CALIFORNIA UNDER THE LAWS OF CALIFORNIA STAND UPON THE SAME FOOTING AS NATURAL PERSONS, AND ALL DISTINCTIONS BETWEEN NATURAL AND ARTIFICIAL PERSONS IN THAT STATE HAVE LONG SINCE BEEN ABROGATED.

Again, this constitutional enactment and this legislation is sought to be justified upon the ground that these so-called corportions do not stand before the laws of that State upon an equality with every person and with every individual in it. That is an entire misapprehension of the condition of the laws of that State, and one which a gentleman residing here might well fall into. Says the learned counsel upon the other side, on page 23 of his brief:

"He (meaning a corporation) asks that he may be exempt from the laws of the State which, as against a private citizen, prohibit common labor on the Sabbath day."

There is no such distinction in the laws of that State. The laws of that State apply to persons and corporations alike. In the criminal laws the word "corporation" is not used except where it is necessary in providing for proceedings against these associations. There are few things that may not be lawfully done in California on Sunday. Some things are prohibited by law, but the prohibitions apply to persons and to corporations alike. Again counsel says:

"He (meaning a corporation) asks from the State the right to demand (what is not accorded to private travel) that all other lines of commerce shall afford to him and to his line all reasonable connections, exchanges, and facilities for business, and he receives these enforced privileges, which are not accorded to any others of the people."

Nothing of the kind. The rights and duties of these railroad corporations are regulated in that respect by the laws of the State of California applicable to carriers. The most powerful corporation of that State, with its thousands of miles of road and lines of telegraph, its road fully equipped with freight and palace cars, stands precisely upon the same footing with the humble laborer with his cart and horse.

Each is a carrier, because each receives and transports persons and property for hire, and he does not receive (at least, in the sense in which it is used in the constitution and laws of that State) tolls. A corporation, like a natural person, receives freightage, and, like a natural person, is limited to a reasonable compensation for services rendered. There are no exceptions. He as well as the humblest individual engaged in that business is required to receive persons and property offered for carriage without discrimination in regard to price, person, or place.

To the end that there may be no misapprehension upon this subject—a subject which the learned counsel for the plaintiff in error has treated as a turning point in this case—I read the sections of the code of California appertaining thereto.

Section 2110, civil code, is:

"Property carried is called freight; the reward, if any, to be paid for its carriage is called freightage; the person who delivers the freight to the carrier is called the consignor, and the person to whom it is to be delivered is called the consignee."

Section 2168, civil code, is:

"Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry."

Section 2170, civil code, is:

"A common carrier must not give preference, in time, price, or otherwise, to one person over another."

Section 14 of the civil code, among other things, declares—

"That word person includes a corporation as well as a natural person."

Eminent Domain.

The counsel upon the other side also says in his brief:

"He (meaning a corporation) demands from the State the right, without your leave and against your protest, to cut in twain your farm or the curtilage of your house, and from the State he gets the right accorded to none others of the people."

Upon this topic he grows eloquent and declares:

"He demands from the State the right to destroy your home, to penetrate the heart of your cities, to occupy with his highway your highways, and to render all these unsafe, uncomfortable, and unwholesome, and he gets from the State the right to do all these—a right accorded to none other of the citizens."

That is eminent domain. Now, with all due respect to the learned counsel, he is entirely mistaken. Corporations were originally created by royal grant, or they might grow

up by prescription which presupposes a royal grant. In this country they were formerly and in some States still are created by legislative enactment. Under such a legislative enactment they had a right to build a railroad, to construct it through the territory of the State, and could not construct it without the privilege which the act conferred. They were accorded the right as agents of the State to invoke the power of eminent domain, but they were bound to make just compensation before that power could be exercised.

Hence it was when the Baltimore and Ohio Railroad Company undertook to reach the Ohio river they had to appeal to the State of Virginia for the privilege to enter its territory. They had to ask leave to exercise that power which the State held—a right to take private property for public use—because there was no general statute in that State which made every person within the State who undertook a work of that kind the agent of the State in whose behalf eminent domain could be exercised.

Such corporations were created with powers which were not of common right—with powers which any other person could not of common right exercise—and a franchise is well described by saying that it is a thing not of common right but the gift of the sovereign or of the State to certain persons.

These associations of individuals under California laws should never have been called corporations. The word as understood by lawyers does not describe the thing. The laws relating to such associations were passed to encourage and to favor the right of association—a natural right which exists independent of all laws.

The CHIEF JUSTICE: Was not the Central Pacific Railroad Company originally incorporated under a special law?

Mr. HAYMOND: No, sir; it was incorporated under a general law; and, in the sense in which that word is used here, it holds no franchises except those granted to it by the national Government.

Mr. Justice FIELD: The old constitution of California prohibited any private corporation.

Mr. HAYMOND: Yes; there was never a private corporation *created* in the State of California.

Mr. Justice MILLER: Were these corporators exempt from liability from the debts of the corporation?

Mr. HAYMOND: No, sir.

Mr. Justice MILLER: Was not every corporator in that railroad liable for all its debts?

Mr. HAYMOND: Only in proportion to the shares of stock he held in it at the time the debt was contracted, and not for all the debts.

Mr. Justice MILLER: There is a limitation, then, upon the liability?

Mr. HAYMOND: Yes, sir; a limitation upon the liability, and so there is in relation to partnerships. It is rather an extension of liability, because at common law there was no liability. The formation of these corporations are treated of in the civil code at present, but the laws have always existed substantially as they have been formulated in the civil code. That code is divided into four parts. The first relates to persons and regards the rights of persons with each other, and corporations fall within that heading. Section 283 treats of the powers which may be exercised by the associations, and of the length of time they may exist.

It is said that we have a perpetual existence. The period fixed is fifty years in California for the existence of such associations. We have many partnerships there that have perpetual succession—notably mining partnerships.

The CHIEF JUSTICE: A company organized under your general law has only such powers as are granted by it?

Mr. HAYMOND: It has a portion of the powers possessed by natural persons. It has no power which a natural person does not have. It cannot exercise one single power that an individual does not exercise there without any articles of incorporation; not one. On the contrary, the powers which

it exercises fall short of individual powers. There are limitations upon them which are not placed on the individual. A so-called corporation in California holds the legal, naked title to the property, and that is all. Its directors administer the affairs of the company.

Mr. Justice FIELD: Will you refer me to the section of the law which authorizes an individual to exercise the right of eminent domain?

Mr. HAYMOND: If your honor will permit, I will come to that soon. Such so-called corporations hold the legal title to the property simply. Either of the justices of this Court having the means to-morrow might appoint a trustee in California, give him the property, and clothe him with the authority and power to parallel every railroad line in that State and to run and operate them. He might limit his liability on any indebtedness which the trustee contracted. If four or five of you were engaged in it you might limit by your deed of trust the liability of each to a proportionate share.

My learned friend on the other side says that these corporations are not persons within the fourteenth amendment, because they cannot vote or hold office. Those are political rights. The clause of the fourteenth amendment which you are now considering deals with civil and not with political rights—the civil rights of persons. Women cannot vote (although I think they ought to vote) and they cannot hold office in many of the States. A person not a citizen of the United States is entitled to all the protection of this amendment, yet he can neither exercise the right of suffrage nor hold office.

Section 1000 of the civil code provides for the manner in which property can be acquired, and five ways of acquiring it are enumerated. No one can exercise the right of eminent domain except the State; that is a power which cannot be delegated. We speak of corporations exercising it under a statute, but this is not accurate. We are all apt to suppose

that things familiar to ourselves are familiar to everybody else, but I want your honors to bear in mind particularly that the word "person" in this code includes corporations. This section is all that authorizes any person or corporation in California to exercise the right of eminent domain, if we may use the word in that sense.

Under sections 1000 and 1001 the Chinaman, despised of the idle and dissolute of that State, when it comes to exercising this right, stands precisely upon the same footing with the National Government when it undertakes to condemn lands for its light-houses or its fortifications. It does not require citizenship.

Section 1000 of the civil code is as follows:

"SECTION 1000. Property is acquired by—
"1. Occupancy.
"2. Accession.
"3. TRANSFER.
"4. Will; or
"5. Succession."

Section 1001 of the civil code reads as follows:

"SECTION 1001. ANY PERSON may, without further legislative action, acquire private property for any use specified in section 1238 of the code of civil procedure, either by consent of the owner or by proceedings had under the provisions of title VII, part III, of the code of civil procedure; and any person seeking to acquire property for any of the uses mentioned in such title is 'an agent of the State' or a 'person in charge of such use,' within the meaning of those terms as used in such title. This section shall be in force from and after the fourth day of April, eighteen hundred and seventy-two."

Section 1237, Code of Civil Procedure, is as follows:

"Eminent domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title."

Section 1238, Code of Civil Procedure, provides that:

"Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following uses:

"1. Fortifications, magazines, arsenals, * * *

"2. Public buildings and grounds for the use of the State. * * *

"3. Public buildings and grounds for the use of any county, incorporated city, * * *

"4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll-roads, by-roads, plank and turnpike roads, steam and horse railroads; canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.

"5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines. * * *

"6. By-roads leading from highways to residences and farms.

"7. Telegraph lines.

"8. Sewerage of any incorporated city or city and county, or of any village or town, whether incorporated or unincorporated." * * *

Section 1240, Code of Civil Procedure, is as follows:

"The private property which may be taken under this title includes—

"1. All real property belonging to any person.

"2. Lands belonging to this State. * * *

"3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated.

"4. Franchises for toll-roads, toll-bridges, and ferries. * * *

"5. All rights of way for any and all the purposes mentioned in section twelve hundred and thirty-eight. * * *

"6. All classes of private property not enumerated may be taken for public use." * * *

Section 1244, code of civil procedure, is as follows:

"The complaint must contain—

"1. The name of the corporation, association, commission, or PERSON in charge of the public use for which the property is sought, who must be styled plaintiff.

"2. The names of all owners and claimants of the property. * * *

"3. A statement of the right of the plaintiff.

"4. If a right of way be sought, the complaint must show the location, general route, * * *

"5. A description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract." * * *

Mr. Justice MILLER: As it is about time for our adjournment, I want to ask you a question before we adjourn. I have been puzzled all through these readings of the constitution and provisions for taxing the mortgage interest to the mortgagee and the balance of the interest to the holder of the property, and I would like to know if there are any provisions or what are the provisions for enforcing the conditions of the taxation on the mortgagee, the holder of the mortgage.

Mr. HAYMOND: I will come to that point, if your honor please, to-morrow.

The court then adjourned.

FRIDAY, *January* 13, 1888.

Mr. HAYMOND resumed his argument as follows:

If your honors please, when the Court adjourned yesterday I was endeavoring to show, by reference to the laws of the State of California, that the associations of individuals therein designated as corporations exercised no special privileges; that this corporation had not been created, nor had any other private corporation ever been created by the State of California; that they existed under general laws—general municipal laws regulating the right of association; that the corporation—the corporate entity—simply held the legal title to the property; that under all of the adjudications in Cali-

fornia the beneficial interest in the property was in the persons who compose the corporation; that such corporation exercises no powers that a private person cannot as of common right exercise.

Now, there has been in California four different sets of corporation laws, all passed upon the same theory, but differing in detail. Under all of these laws corporations have about the same rights that they have now, and under all of them they were formed by the voluntary association of individuals and came into life and being by simply filing a certificate with the clerk or secretary of state that they desired so to do.

These laws have been repealed and changed three different times before the enactment of the code, and in each case it was provided that corporations formed under the old laws might exist under the old laws unless they chose to come in under the new.

The Central Pacific Railroad Company was a corporation organized under the act of 1861, which act codified is the act substantially as found in the code.

Prior to 1872 there was no general law in that State which defined eminent domain and prescribed who were agents of the State and in whose behalf it might be exercised. In 1872, when the codes were adopted, the sections which I have quoted were part of the civil code. Prior to that the corporation acts conferred the authority.

Since 1872 and for seven years before the adoption of the new constitution—it made no difference what the capacity of the person was, natural or otherwise—the right to act as an agent of the State and to proceed in the courts to acquire property for a public use was conferred upon everybody in charge of a public use.

So that there is no distinction in this respect, nor in any other that I know of, between these so-called corporations and a natural person. True, a corporation may have a seal; but in California all distinctions between sealed and un-

sealed instruments have been abolished. A corporation need not act under its corporate seal. It signs its name by its secretary, and the authority for that action is the resolution of its board of directors or its by-laws. They are a voluntary association; and, as I said yesterday, you could select any person in California, create a trust, and have him hold the legal title of the property and do all things that any corporation of that State can do. For this reason if there was any classification based upon the fact that these corporations were exercising certain privileges it must fall.

OFFICE OF THE FOURTEENTH AMENDMENT.

There was never any reason in this country, under our form of government, why anybody should be authorized to acquire property of any kind.

It is true that railroad and telegraph property and property in telephones and a thousand other things was unknown to the framers of the Federal Constitution; but that Constitution, as well as all of our State constitutions, never gave any right to the people of the United States to acquire property or to enjoy life, liberty, or property. These rights were declared in the very beginning to exist independent of all constitutions and laws.

So there never was any occasion for affirmative action that a man might build, own, and operate a railroad, if he could acquire by purchase the property upon which it was to be built. There never was any occasion for such action that he might build a telegraph line, if he could acquire by purchase the property over which he built. There was action required in order that he might acquire property against the consent of the owner, and that action was based on the fact, not that a corporation desired to do it, but upon the fact that the person who desired to do it was in charge of a public use.

The control over property for that purpose rests upon the same ground precisely as the control over elevators, mills, and hotels. It rests upon the fact that such property is

quasi-public and is dedicated to a use which gives the Government over it some sort of control.

It is true that up to the time of the adoption of the fourteenth amendment that a State acting by the concurrence of all of the departments of Government—by the concurrence of the judiciary, the legislative, and executive departments—might deprive a person of life, liberty, and property, and that there was no remedy. The right of the slave to his liberty in this country was no greater or more sacred after the emancipation proclamation and the adoption of these amendments than it was before; yet at one time he was deprived of that liberty by the action of almost every State in the Union.

It is said that the fourteenth amendment to the Constitution does not in terms apply to the taxing power of the State. If this were conceded it would only bring us back to an examination of what this taxing power is. This power, like every other power of the Government, State and Federal, must be exercised in subordination to the great principles which underlie the foundation of our Government, that no State, nor the people thereof, nor any majority of the people, however great, can, without due process of law, deprive any person of life, liberty, or property.

But how is that to be enforced? Suppose the State of California did deprive me of liberty or of property without due process of law. Unless the act which the State did fell under some prohibition by the Federal Constitution upon a State, such as that it should not impair the obligation of contracts, I had no remedy here.

When the fourteenth amendment was adopted it declared these great principles and placed them under the protection of the National Government, and for the first time in the history of the country could this Central Government reach out and protect the citizen in these rights against the action of the State.

This amendment alone would, had it been executed, have given, without any other act of this Government, liberty to every one of the four million slaves held. Without any other action it secures to every person in this broad land the protection of every department of the National Government. Whenever a State, by any act of either department of its government or by the administration of any law, deprives any person of any of these rights, without due process of law, or denies to him the equal protection of the law, the jurisdiction of this Court attaches, because then it has a case arising under the Constitution of the United States.

It attaches and the protection of the National Government follows, not because the invasion is under the pretense of exercising the taxing or any other power of the State government, but because there is an invasion by the State or its officers who administer its laws of the natural rights to life, liberty, or property, because the State or the officers who administer its laws deny to a person the equal protection of the laws.

The clause of the fourteenth amendment under consideration here—"nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law"—does not, in terms, apply to the exercise of any one power of a State government. It applies to all. It subordinates the exercise of every power to the great fundamental truths—that the right to life, liberty, and property and the equality of all before the laws are natural rights, to secure which just governments are instituted. It reaches the wrong and protects persons and property, when unlawfully assailed, without regard to the source from which the assault comes and without regard to the pretense under which the assault is delivered.

THE TAXING POWER AND THE OPERATION OF THE FOURTEENTH AMENDMENT THEREON CONSIDERED.

"*Resolved*, That a right to liberty and property (which are the natural means of self-preservation) is absolute, inalienable, and can never be lawfully given up by ourselves, or taken from us by others."—*Mendon Resolutions, adopted at Mendon, Mass., in* 1773. (*See Bryant's History U. S., vol.* 3, *p.* —.)

"We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to SECURE these rights, governments are instituted among men, deriving their JUST powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it and to institute a new government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."

"SEC. 2. That absolute, arbitrary power over the lives, liberty, and property of freemen exists nowhere in a Republic—not even in the largest majority.

"SEC. 3. The right of property is before and higher than any constitutional sanction." (*Constitution of the State of Kentucky, old and new sections* 2 *and* 3 *of the Bill of Rights.*)

The taxing power has limitations inherent in the very subject itself.

This limitation upon the taxing power finds a resting place in the fundamental principles which underlie our republican form of Government, and therefore cannot lawfully be removed, either by the Government or by the people; for the right of property is BEFORE and HIGHER than any constitutional sanction, and arbitrary power exists over it nowhere in this Republic.

The American Constitutions were ordained and established, not to *confer* rights *upon* the people, but to *secure* rights which already existed, and many of which—for instance, the right to life, liberty, and property—were *inalienable.*

To "*secure* the blessings of liberty to ourselves and our posterity" was a declared purpose of the framers of the Federal Constitution, and to "*secure* and perpetuate" the blessings of freedom our State constitution was established.

Both constitutions expressly recognize the existence of inalienable rights, among which are those of "enjoying and defending life and liberty, and acquiring, possessing, and protecting property," and both provide "that no person shall be deprived of * * * property without due process of law." (Federal Constitution, art. V, amendments; State constitution, art. 1, sec. 13.)

"In considering State constitutions," says Mr. Cooley (Cooley on Const. Lim., pp. 36, 37), "we must not commit the mistake of supposing that because individual rights are guarded and protected by them they must also be considered as owing their origin to them. These instruments measure the power of the rulers, but they do not measure the rights of the governed. What is a constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community or the origin of private rights; it is not the fountain of law or the incipient state of government; it is not the cause, but the consequence, of personal and political freedom; it grants no rights to the people, but is a creature of their power, the instrument of their convenience. *Designed for their protection in the enjoyment of the rights and powers which they possessed before the Constitution was made, it is but the frame-work of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought.* There is nothing primitive in it; it is all derived from a known source. It presupposes an organized society, law, order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard against the encroachments of tyranny. A written constitution is in every instance a limitation upon the powers of government in the hands of agents."

Referring to the very power involved in this discussion—the power of taxation—Mr. Justice Miller, delivering the opinion of the Court in the case of the Loan Association *vs.* Topeka (20 Wallace, 662), says:

"It must be conceded that there are rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the

liberty, and property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is, after all, but a despotism. It is true, a despotism of the many—of the majority, if you choose to call it so—but it is none the less a despotism. It may well be doubted if any man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many."

And again (*id.*, p. 663):

"*There are limitations on such power* which grow out of the essential nature of all free governments—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all Governments entitled to the name."

Mr. Knight says:

"In our time a French writer has recorded that after attending a debate in the House of Commons he observed to an English statesman that he had heard no assertion of the general principles of constitutional freedom. The answer was, 'We take that for granted.'" (Knight's England, vol. 3, p. 417.)

And Mr. Cooley, in considering the nature and extent of State constitutions, admits that "many of the most important principles of government are usually not declared at all, but simply taken for granted." (Note 1, Cooley's Const. Lim., p. 41.) In discussing the limitations upon the taxing power, he observes (Cooley on Const. Lim., 41):

"Vast as is the power of the Government to levy taxes upon its citizens, there are, nevertheless, limitations upon it of a very distinct and positive character, *which inhere* in the very *nature of the power itself*. Some of these limitations are commonly declared in the written constitutions, but the declaration is rather from abundant caution than from any ne-

cessity, *as the limitations are equally imperative herewith, thus declared or not.*"

In Angell and Ames on Corporations (sec. 436) it is said:

"In this country, though the right to impose taxes is inherent in the Legislature and extends to subordinate communities, as counties, cities, towns, etc., yet it is not admitted to be omnipotent, *it being limited and controlled by certain principles that lie at the very foundation of our civil and political institutions.* The principle that the right cannot properly exist without representation was a fundamental ground of the American Revolution. But it is not sufficient that no tax or imposition can be imposed upon the citizens of the United States unless by their representatives in the Legislature or by their representatives which constitute the Government of a county, town, etc.; but every person, natural and corporate, is entitled to require of the law-givers that taxation be *fair* and *equal* in proportion to the value of his or their property, and that no one class of individuals should be unjustly assessed."

And Mr. Chancellor Kent says:

"Every person is entitled to be protected in the enjoyment of his property, not only from invasions of it by individuals, but from all *unequal* and *undue assessments* on the part of government. It is not sufficient that no tax or imposition can be imposed upon the citizens but by their representatives in the Legislature. The citizens are entitled to require that the Legislature itself shall cause all public taxation to be fair and equal in proportion to the value of his or their property, so that no class of individuals *and no one species of property may be unequally or unduly assessed.*"

2 Kent, 331, 332.

Mr. Potter (1 Potter on Law of Corporations, sec. 217, p. 192) says:

"Whatever limitations exist upon the legislative authority to wield its full scope in the taxing power of the State at its will *must be sought in the nature of the power itself* as thus briefly expressed, and in the express or implied restrictions

of the national and State constitutions. Taxation implies, as we have seen, an imposition for a *public use;* and it also IMPLIES that the imposition shall be upon a system of apportionment, so as to secure uniformity among those who are, or ought to be, subject to the particular tax; and hence we may readily conceive of acts of the Legislature demanding sacrifices of citizens which could not be sustained as legitimate exercises of the taxing power, *although no specific provision of the Constitution should be infringed.*"

In the case of Washington avenue (69 Penn. St. R., 362), Agnew, J., delivering the opinion of the court, says:

"There is no case in our books wherein the legislative power to tax has been maintained with greater vigor and ability than Sharpless *vs.* The City of Philadelphia (9 Harris); yet even there the chief justice admits (p. 166) that the exercise of the power may be forbidden by clear implication as well as express restriction. 'It is not every act the Legislature may choose to call a tax law that is constitutional.' 'The whole public burden,' he contends, 'cannot be thrown on a single individual under pretense of taxing him.' This is a concession that taxation has a limit, *per se*, and is not only always co-extensive with legislative exaction. When, therefore, the Constitution declares, in the ninth article, that among the *inherent* and *indefeasible* rights of men is that of acquiring, possessing, and protecting property; that the people shall be secure in their *possessions* from *unreasonable seizures;* that no one can be deprived of his *property* unless by the judgment of his peers or the law of the land; that no man's *property* shall be taken or *applied* to public use without *just compensation* being made; that every man, for an injury to his *lands or goods*, shall have remedy by *due course of law* and *right* and justice administered without sale, denial, or delay, and that no law impairing contracts shall be made; and when the people, to guard against the transgressions of the higher power delegated by them, declared that these rights are excepted out of the general powers of government, *and shall forever remain inviolate*, they, for their own safety, stamped upon the right of private property an inviolability which cannot be frittered away by verbal criticism on each separate clause.

"There is a clear implication from the primary declaration of the inherent and indefeasible right of property followed by the clauses guarding it against specific transgressions that cover it with an ægis of protection against all unjust, unreasonable, and palpably unequal exactions under any name or pretext, nor is this sanctity incompatible with the taxing power or that of eminent domain where, for the good of the whole people, burdens may be imposed or property taken.

"I admit that where the power to tax is unbounded by an express limit in the constitution that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good further than all derive benefit from the purpose to which it is applied; but, nevertheless, taxation *is* bounded in its exercise by its own nature, essential characteristics, and purpose. It must, therefore, visit all alike in a reasonably practicable way of which the Legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people in districts and by turns, but still it must be public in its purpose and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is a confiscation; not taxation, extortion; not assessment, and falls within the clearly and implied restriction in the bill of rights."

In People *vs.* Mayor of Brooklyn (6 Barb., 214) the court says:

"Untrammeled by authorities, a safe and sound rule may be deduced from a few simple and well-settled principles. *In the first place it may be assumed as a fundamental principle in our Government and laws that individuals are protected in the enjoyment of their property, except so far as it may be taken in two ways, viz: As a public tax, upon principles of just equality, or for public use, with a just compensation ascertained according to the provisions of the Constitution;* secondly, as money is property, every tax or assessment is taking property in some mode, and to be legal must refer to one of the modes above mentioned. Taxes are defined to be 'burdens or charges imposed upon persons or property to raise money for a

public purpose.' The right to impose a tax is inherent in every government. * * * We are not, however, to understand that the Legislature is omnipotent on this subject. *Its powers are limited and controlled by certain principles which lie at the very foundation of free government.* Among these is the principle of just equality. * * * This is the only sense in which a tax is public. The Legislature has not the constitutional authority to exact from a single citizen or a single town or county or city the means of defraying the entire expenses of the State; for if this could be done the constitutional prohibition would be evaded in all cases and the Legislature could take private property for public use without compensation, to any extent, *under the vague and indefinite pretense of taxation.*"

Again, at page 216, the court says:

"The true rule, deducible from sound reasoning as well as the authorities, is this: *Legitimate taxation is limited to the imposing of burdens or charges for a public purpose, equally upon the persons or property within a district known and recognized by law.*"

The case above referred to is cited approvingly in People *vs.* Lynch (51 Cal., 20).

Judge Christiancy (Woodbridge *vs.* The City of Detroit, 8 Mich., 306), referring to the constitutional provisions that private property should not be taken for public use without just compensation, says:

"It is true these provisions do not refer to a taking of property in payment of a tax or burden imposed under the taxing power nor in payment of a debt or other duty to the public. It is doubtless true, also, that these prohibitions are primarily aimed against a direct taking of property to be used in kind by the public, though the language itself makes no such distinction; and the reason why it is properly so construed is because all the recognized modes of indirect taking include the idea of compensation. This is the only reason for the construction. The maxim, therefore, applies to these prohibitions in its full force, that what cannot be done directly shall not be done indirectly; *and when indirect means are employed to accomplish what is forbidden to be*

done directly the law rejects the indirect means as of no validity and treats the case as if the same end were obtained by direct means. If this were not so the whole effect of the prohibition might in all cases be evaded with impunity by the simple device of making the process consist of two steps instead of one; and while the Legislature could not authorize the taking of A's land for a public park they might, under the specious name of tax or assessment, raise by the sale of A's land the whole sum necessary to pay B for his land to be taken for that purpose; * * * and though they cannot take and use your property directly they may sell it and use the money to purchase other property of the same or any other description.

"It is true that liability to abuse is not always of itself strong evidence of the non-existence of a power, since all legislation and all *human* power is liable to abuse; but the fact that a proposed rule of construction would remove all constitutional restraint is a very strong evidence that the rule is erroneous." (*Id.*, p. 307.)

In Wilkinson *vs.* Leland (2 Peters, 627) Mr. Justice Story held this language:

"*The fundamental maxims of free government seem to require that the rights of personal liberty and private property should be held sacred.*"

In Vermont and in North Carolina it has been held that "altogether aside from any express provision of the constitution a statute taxing property without necessity of a public character, or without compensation in some form, would, doubtless, be regarded as entirely without the just limits of legislative power." (Hatch *vs.* Vermont R. R. Co., 25 Vermont, 49; Railroad Co. *vs.* Davis, 2 Dev. and Bat., 451.)

In New York, prior to the adoption of the constitution of 1821, there was no provision in the constitution of that State providing that private property should not be taken for public use without just compensation, but in a case decided by the court of errors (Rogers *vs.* Bradshaw, 20 J. R., 735), before the adoption of the constitution of 1821, where

the canal commissioners had been authorized to take land, but no provision had been made for compensation, it was said: "This equitable and constitutional right to compensation undoubtedly imposes it as an absolute duty on the Legislature to make provision for compensation whenever they authorize an interference with private right." (See also People *vs.* Platt, 17 J. R., 195; Bronson's Opinion in Taylor *vs.* Porter, 4 Hill, 140; and Powers *vs.* Bergen, 2 Seld., 358.)

In Goshen *vs.* Stonington (4 Conn., 209), Hosmer, J., held that *if there should exist a case of direct infraction of vested rights too palpable to be questioned and too unjust to admit of vindication' he could not avoid considering it a violation of the social compact and within the control of the judiciary, although the constitution had imposed no explicit restraint.* He asks, "If a law were made without any cause to deprive a person of his property, or to subject him to imprisonment, who would not question its legality or who would carry it into effect?"

There is no express provision in the constitution of any American State which forbids the taking of private property for private uses; but can it be so taken? Would a constitutional provision to that effect be upheld? We answer unequivocally both questions in the negative, and why? Because such a provision would violate the fundamental principles of free government as declared in the bill of rights, and which lie at the foundation of the social compact.

Mr. Justice Field (Butchers' Union Case, 111 U. S., page 756) observes:

"As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all governmental action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence—that new evangel of liberty to the people: 'We hold these truths to be self-evident'—that is, so plain that their truth is recog-

nized upon their mere statement—'that all men are endowed'—not by edicts of emperors or decrees of Parliament or acts of Congress, but 'by their Creator with certain inalienable rights'—that is, rights which cannot be bartered away or given away or taken away except in punishment of crime—'and that among these are life, liberty, and the pursuit of happiness, and to secure these'—not grant them, but secure them—'governments are instituted among men, deriving their just powers from the consent of the governed.'

"Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment.

"The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States and an essential element of that freedom which they claim as their birthright."

See also Matter of Application of Jacobs (98 N. Y., p. 99) and People *vs.* Marks (99 N. Y., p. 377).

The constitution of California expressly recognizes the existence of inalienable rights protected by sanctions more sacred than constitutional guarantees.

These rights are referred to in sections 1, 14, 21, and 23 of article I of the State constitution in terms as follows:

"SECTION 1. All men are by nature free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.

"SEC. 14. Private property shall not be taken or damaged for public use without just compensation having been first

made to or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law.

"SEC. 21. No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.

"SEC. 23. This enumeration of rights shall not be construed to impair or deny others retained by the people."

The constitution recognized the inviolability of private property, and wisely so, since few interests take a deeper hold on man than those which relate to property. Much of the general prosperity and much of the unexampled activity, energy, and enterprise which distinguish the present era is due to the all-prevailing conviction that private property is secure. (Dillon, C. J., in Hanlon *vs.* Vernon, 27 Iowa, 42.)

These rights, which are beyond the reach of government and of the people, are strongly and aptly stated in sections 2 and 3 of the bill of rights in the Kentucky constitutions of 1799 and 1850, heretofore read.

Taxes are in effect, as Mr. Mill contends, sacrifices made for the public good, equality of sacrifice being the rule. (2 Pol. Econ., 370, 372.) "Taxation cannot be arbitrary, because its very definition includes apportionment." (Cooley Const. Lim., p. 175.)

In People *vs.* Lynch (51 Cal., 20), a leading case, Justice McKinstry, speaking for the Court, says:

"An assessment for a local improvement is a *tax* differing from other taxes, in that it need not be levied upon the ad valorem principle. Although such assessment is not prohibited by that clause of the State constitution which provides

that 'all property shall be taxed in proportion to its value,' it is of the very essence of taxation, *in every form*, that it be levied with equality and uniformity, and to this end there should be some system of apportionment." (Taylor *vs.* Palmer, 31 Cal., 241.) * * * "Whatever the basis of taxation, the requirement is that it shall be uniform. * * * The terms 'tax' and 'assessment' * * * both include the idea of some ratio or rule of apportionment, so that, of the whole sum to be raised, the part paid by one piece of property shall have the same known relation to or be effected by that paid by another."

The Kentucky constitution of 1799 granted to the Legislature the taxing power, without limitation, other than the limitation under our form of government, inherent in the power itself. In other words, the people of the State of Kentucky conferred upon the Legislature every power of taxation which the people themselves might exercise in their original capacity. The grant was of all legislative power, without limitation, save such limitations as existed independent of constitutional sanction. More than a quarter of a century ago the court of appeals of that State, then composed of three of its most eminent jurists, Hon. George Robertson, Hon. Ephriam M. Ewing, and Hon. Thomas A. Marshall, was called upon to define this power, and of the results reached in their deliberations Judge Cooley (Cooley on Taxation, 177) says:

"The principles by which the legislative apportionment of taxes is to be tested have been so admirably stated that we prefer quoting the language of the court in preference to any attempt at stating them in our own language."

A just tribute from a great jurist to the judgment of a learned court.

The case referred to was Lexington *vs.* McQuillan's Heirs, (9 Dana, 513–516).

The court says (Judge Robertson, one of the first and most accomplished lawyers of the day, delivering the opinion of the court):

"When shall a tax be levied? To what amount? Shall it be a capitation or property tax? Direct or indirect? Ad valorem or specific? And what classes of property are the fittest subjects of taxation? are all questions wisely confided by our constitution to the discretion of the legislative departments, subject to no other limitation than that of the moral influence of public virtue or responsibility to public opinion? But in some other respects, and so far as the power of taxation may be effectual being thus limited, it is, in our opinion, limited by some of the declared ends and principles of the fundamental laws. Among these political ends and principles equality, as far as practicable, and security of property against irresponsible power are eminently conspicuous in our State constitution. An exact equalization of the burdens of taxation is unattainable and Utopian, but still there are well-defined limits within which the practical equality of the constitution may be preserved, and which, therefore, should be deemed impassable barriers to legislative power. Taxation may not be universal, but it must be general and uniform; hence, if a capitation tax be laid, none of the class of persons thus taxed can be constitutionally exempt upon any other ground than that of public service; and if a tax be laid on land no land within the limits of the State can be constitutionally exempted unless the owner be entitled to such immunity on the ground of public service. The Legislature, in the plentitude of the taxing power, CANNOT have constitutional authority to exact from one citizen, or even from one county, the entire revenue for the whole Commonwealth. Such an exaction, by whatever name the Legislature might choose to call it, would not be a tax, but would be undoubtedly the taking of private property for public use, and which could not be done constitutionally without the consent of the owner or owners or without retribution of the value in money.

"The distinction between constitutional taxation and the taking of private property for public use by legislative will may not be definable with perfect precision, but we are clearly of the opinion that whenever the property of a citizen shall be taken from him by the sovereign will and ap-

propriated, without his consent, to the benefit of the public, the exaction should not be considered as a tax unless similar contributions be made by that public itself, or shall be exacted, rather, by the same public will from such constituent member of the same community generally as own the same kind of property.

"Taxation and representation go together, and representative responsibility is one of the chief conservative principles in our form of government. When taxes are levied, therefore, they must be imposed on the public in whose name and for whose benefit they are required and to whom those who impose them are responsible; and, although there may be a discrimination in the subjects of taxation, still persons in the same class and property of the same kind must generally be subjected alike to the same common burden. This alone is taxation, according to our notion of constitutional taxation in Kentucky, and this idea, fortified by the spirit of our constitution, is, in our judgment, confirmed by so much of the twelfth section of the tenth article as declares: '*Nor shall any man's property be taken or applied to public use without the consent of his representatives and without just compensation being previously made to him.*'"

This decision has stood the test of time, and has met the approval of the most enlightened commentators upon our governmental system.

Mr. Justice McKee, in Milligan *vs.* Smith (59 Cal., 206) fully sustains the position we have assumed, that the right of property is before and higher than any constitutional sanction, and that arbitrary power over it exists nowhere in a republic.

The principles enunciated are but the echoes of the Declaration of Independence, proclaiming the equality of all before the law and the existence of inalienable rights, "to secure (not to create) which governments are instituted among men;" principles placed beyond the attacks of the States by the declaration of the fourteenth amendment of the Federal Constitution, "nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal pro-

tection of the laws;" principles which constitute the corner-stone of a free government, and from which it cannot depart without making rebellion to its laws a freeman's right and revolution a people's duty.

"All property shall be taxed in proportion to its value." Upon this law hangs the law and gospel of taxation.

"All property shall be taxed in proportion to its value." How simple the rule; how easy its application; how just and beneficent its operation!

"All property shall be taxed in proportion to its value." This line marks the limit of the power which rests in the people or which can be delegated to any government within the boundaries of the republic. Within that limit are peace, order, security, and all just governmental powers; without are turmoil, confusion, spoliation, and anarchy.

"All property shall be taxed in proportion to its value." To this test must come every revenue law, whether such law rests alone upon legislative action or on sound constitutional enactment. If it fail to meet this test, reason, principle, and authority—the trinity of the law—unite in the judgment that it is not the exercise of the lawful power of taxation, but that it is the exercise of the unlawful power of confiscation.

If every person in the land should agree that contribution might be exacted from property for the support of the Government by any other rule than that of equality and uniformity; if by unanimous consent the power to impose such burdens unequally was attempted to be conferred upon government, such rule could not be lawfully enforced, nor such power lawfully exercised. The rule and the power would invade the domain of the inalienable right. No one can surrender that which is not his own. The inalienable rights which exist independently of constitutional sanctions are not the property of this generation. They are the heritage of peoples yet to be, and we are but the trustees of that heritage, clothed with the limited right of present use and enjoy-

ment, and charged with its defense and maintenance, to the end that we may transmit it unimpaired to the rightful heirs.

The power of taxation is the only power which the plaintiffs do or can invoke to sustain these actions; but we have seen that there is a limitation inherent in the power to tax, namely, that when taxes are levied upon property they must be apportioned with reference to a uniform standard—must be laid, by some rule of equality and uniformity—otherwise they would degenerate into mere arbitrary exactions, and such an exaction, by whatever name the Legislature might choose to call it, would not be a tax, but would undoubtedly be the taking of private property for public use without just compensation. This limitation finds a resting place in the fundamental principles which underlie our republican form of government, and therefore cannot be lawfully removed, either by the Government or by the people. "The right of property is before and higher than any constitutional sanction," and "arbitrary power over it exists nowhere in a republic."

THE FOURTEENTH AMENDMENT APPLIES WHENEVER THE STATE, UNDER ANY PRETENSE, INVADES THE DOMAIN OF NATURAL RIGHTS.

Under no pretext whatever can the State lawfully take life, liberty, or property without due process of law—neither under the exercise of the taxing or any other power.

It would have been a remarkable thing if the fourteenth amendment had been written that "No State shall deprive any person of life or liberty without due process of law or deny to him equal protection of the law, except in the collection of taxes." Taxation need not be mentioned at all. These principles operate upon every act of the Government, and, therefore, it is not the thing to say that that amendment in express terms includes taxation. Of it it should be said: "It secures all rights and brings to their protection the power of the national Government—the united power of sixty millions of freemen." Lawful taxation in itself never invades any of those rights.

The difficulty was, before the adoption of the fourteenth amendment, that we had no remedy against the action of the State. The Federal Government, if Mr. Chief Justice Waite was despoiled of his property in England, would right him, even if it had to wage a war, but against a State which had despoiled him of his property he had no remedy. Now, whenever the right to life, liberty, or property is invaded by a State, or when any person is denied the equal protection of the law, the fourteenth amendment applies. It matters not under what power the State assumes to act, for the protection runs against all power and in favor of rights which cannot be invaded by the State under any circumstances or upon any pretext whatever.

The fourteenth amendment of the Constitution, in declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property. It applies to the taxing power and to all other governmental powers. Whatever the State may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws, and by equal protection of the laws is meant equal security under them to every one, on similar terms, in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances.

Unequal exactions in every form or under any pretense are absolutely forbidden; and, of course, unequal taxation, for it is in that form that oppressive burdens are usually laid. It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible; where different persons may be taxed on their property of the same kind, similarly situated, at different

rates; where, for instance, one may be taxed at one per cent. on the value of his property, another at two or five per cent., or where one may be thus taxed according to his color, because he is white or black or brown or yellow, or according to any other rule than that of a fixed rate proportionate to the value of his property.

MR. JUSTICE FIELD UPON THE OPERATION OF THE FOURTEENTH AMENDMENT.

As to the operation of the fourteenth amendment upon the taxing power of the State, I quote from the unanswered opinion of Mr. Justice Field, the circuit judge in the Santa Clara case; I also beg to refer the Court to the opinion of Judge Sawyer in the same case and to the opinions of Mr. Justice Field and Judge Sawyer in the San Mateo case, copies of which I have filed with the clerk for the justices of this Court. Says Mr. Justice Field:

"With the adoption of the amendment the power of the States to oppress any one under any pretense or in any form was forever ended, and henceforth all persons within their jurisdiction could claim equal protection under the laws, and by equal protection is meant equal security to every one in his private rights—in his right to life, to liberty, to property, and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances. This protection attends every one everywhere, whatever be his position in society or his association with others, either for profit, improvement, or pleasure. It does not leave him because of any social or official position which he may hold, nor because he may belong to a political body or to a religious society or be a member of a commercial, manufacturing, or transportation company. It is the shield which the arm of our blessed Government holds at all times over every one—man, woman, and child—in all its broad domain, wherever they may go and in whatever relations they may be placed. No State—such is the sovereign command of the whole people of the United States—no State shall touch the life, the liberty, or the property of any person, however humble his lot

or exalted his station, without due process of law, and no State, even with due process of law, shall deny to any one within its jurisdiction the equal protection of the laws.

"Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are and always will be more or less inequalities in the operation of all general legislation, arising from the different conditions of persons, from their means, business, or position in life, against which no foresight can guard; but this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality, or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed against the perpetration of injustice and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation leveled against special classes has been the fruitful means of oppressions and the cause of more commotions and disturbances in society, of insurrections and revolutions, than any other cause in the world. It would, indeed, as counsel in the San Mateo case ironically observed, be a charming spectacle to present to the civilized world if the amendment were to read as contended it does in law—'Nor shall any State deprive any person of his property without due process of law, *except it be in the form of taxation*, nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation*.' No such limitation can be thus engrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation without due process of law is not thus permitted, nor the power by taxation to deprive any person of the equal protection of the laws.

"Soon after the adoption of the amendment Congress recognized by its legislation the application of the prohibition to unequal taxation. The original civil rights act, previously passed, made persons of the emancipated race citizens and declared that all citizens of the United States of every race or color should have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, and

give evidence; to inherit, purchase, lease, sell, own, and convey real and personal property, and to the benefit of all laws and proceedings for the security of persons and property as was enjoyed by white citizens, and should be subject to like punishments, pains, and penalties, and to none other. After the adoption of the amendment the act was re-enacted, and to the clause that all persons should enjoy the same rights as white citizens and be subject to like punishments, pains, and penalties, it added, And subject only to like '*taxes, licenses, and exactions of every kind, and to no other.*' The Congress which re-enacted the civil rights act with this addition was largely composed of those who had voted for the amendment, and it is well known that oppressions by unequal taxation were the subject of consideration before the committee of the two Houses under whose direction the amendment was proposed; but were this otherwise, and were the wrong of such unequal taxation not prominently in the minds of the framers, it being within the language, it must be held to be within the operation of the prohibition. As truly and eloquently said by Mr. Conkling in the argument of the San Mateo case: 'If it be true that new deeds have come; if it be true that wrongs have arisen or shall arise which the framers in their forebodings never saw—wrongs which shall be righted by the words they established, then all the more will those words be sanctified and consecrated to humanity and progress.'

"The fact to which counsel alluded, that certain property is often exempted from taxation by the States, does not at all militate against this view of the operation of the fourteenth amendment in forbidding the imposition of unequal burdens. Undoubtedly since the adoption of that amendment the power of exemption is much more restricted than formerly, but that it may be extended to property used for objects of a public nature is not questioned—that is, where the property is used for the promotion of the public well-being and not for any private end. Thus property used for public instruction, for schools, colleges, and universities, which are open to all applicants on similar conditions, may properly be exempted. The public benefit is the equivalent to the State for the tax which would otherwise be exacted. If buildings used as churches for public worship are also sometimes exempted it must be because, apart from religious considerations, churches are regarded as institutions estab-

lished to inculcate principles of sound morality, leading citizens to a more ready obedience to the laws. Whatever the exemption, it can only be sustained for the public service or benefit received. The equality of protection which the fourteenth amendment declares that no State shall deny to any one is not thus invaded. That amendment requires that exactions upon property for the public shall be levied according to some common ratio to its value, so that each owner may contribute only his just proportion to the general fund. When such exaction is made without reference to a common ratio it is not a tax, whatever else it may be termed; it is rather a forced contribution, amounting, in fact, to simple confiscation. As justly said by the supreme court of Kentucky, in the celebrated case of Lexington *vs.* McQuillan's Heirs, whenever the property of a citizen is taken from him by the sovereign will and appropriated without his consent to the benefit of the public, the exaction should not be considered as a tax unless similar contributions be exacted by the same public will from such members of the same community as own the same kind of property, and, although there may be a discrimination in the subjects of taxation, still persons of the same class and property of the same kind must generally be subjected alike to the same common burden (9 Dana, Ky., 513).

"The cases of People *vs.* Weaver (100 U. S., 539) and of Evansville Bank *vs.* Britton (105 *id.*, 322) will illustrate the character of the discrimination of which the defendants complain. By an act of Congress passed in 1864 and reenacted in the Revised Statutes the shares in national banks are allowed to be included in the valuation of the personal property of the owner in the assessment of taxes imposed by authority of the State in which the banks are located, subject to two restrictions: that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State, and that the shares owned by non-residents of the State shall be taxed at the place where the bank is located (R. S., sec. 5219). In People *vs.* Weaver (100 U. S., 539) the meaning of these restrictions upon the State was considered by the Supreme Court, and it was held—

"1st. That the restriction against discrimination has reference to the entire process of assessment, and includes the

valuation of the shares, as well as the rate of percentage charged thereon;

"2d. That a statute of New York which established a mode of assessment by which such shares were valued higher in proportion to their real value than other moneyed capital was in conflict with the restriction, although no greater percentage was levied on such valuation than on other moneyed capital; and,

"3d. That a statute which permitted a party to deduct his just debts from the valuation of his personal property, except to so much as consisted of those shares, taxed them at a greater rate than other moneyed capital, and was therefore void as to them.

"The discrimination there condemned, by which an increased value was given to the shares of the national banks beyond what was given to other moneyed capital, is a discrimination similar to that made by the elimination of mortgages in estimating the value of railroad property in the cases before us. In Evansville Bank *vs.* Britton the doctrine of this case is approved, and it was held that the taxation of shares in the national banks, under a statue of Indiana, without permitting the owner to deduct from their assessed value the amount of his *bona fide* indebtedness, as he was permitted to do in the case of other investments of moneyed capital, was a discrimination forbidden by the act of Congress.

SECTION 4 OF ARTICLE XIII OF THE STATE CONSTITUTION DOES NOT PROVIDE FOR THE CLASSIFICATION OF PROPERTY.

The learned counsel on the other side, confounding section 4 with section 10 of article XIII of the State constitution, in their brief insist that there is a classification of property, and that all railroads operated in two or more counties are put in a class for purposes of taxation. This is not the case. They confound two sections of this constitution applying to entirely different subjects, the one relating to the deduction of debts secured by mortgages and the other to the tribunals by which assessments shall be made.

I call your honor's attention to this constitution because, literally read, it exempts the Central Pacific Railroad Com-

pany from taxation, and it has had to receive a construction before that railroad could be taxed.

Now, you will bear in mind that the first section of article 13, which has been so often read here, provides that all property in the State shall be taxed in proportion to its value. I also ask your honors to bear in mind all through this argument that we are not now dealing with a tax upon business or upon capacity; that the very tax which it levies upon the franchise is a property tax and so defined, and, so far from the laws of California blending that franchise with the tangible property of the corporation, the direction of law is to the assessor that the franchise shall be kept separate.

Section 4 of article 13 says:

"A mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby."

That is the establishment of a general rule applicable to all property. Now, if that stood alone, if there was nothing more in that clause, the National Government, having a mortgage upon the Central Pacific railroad amounting to twenty-seven million dollars, would be the owner of twenty-seven million dollars of that property and it would be exempt from taxation.

Then follows this language:

"Except as to railroad and other quasi-public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof in the county, city, or district in which the property affected thereby is situated."

And I desire to call the attention of Mr. Justice Miller especially to what follows, so that when I come to respond

to the question which he asked me yesterday from the bench he may have this in mind:

"The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security. If paid by the owner of the security the tax so levied upon the property affected thereby shall become a part of the debt so secured. If the owner of the property shall pay the tax so levied on such security it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof."

The CHIEF JUSTICE: It says: "If paid by the owner of the security the tax so levied upon the property affected thereby shall become a part of the debt so secured." Does that imply that the party who pays it may recover from the railroad company the amount of taxation?

Mr. HAYMOND: No, sir. He can only recover that portion of the tax which the railroad company should have paid. That is the construction, undoubtedly; because when you read the other provision you will see that the tax upon the security should be paid by the owner of the security.

The tax in any event is a lien upon the whole property. If paid by the holder of the security the tax levied against the mortgagor becomes part of the debt secured. If paid by the mortgagor the tax levied upon the security becomes a payment thereon. The tax against the mortgagor is treated here as a tax upon *the property*, while the tax against the mortgagee is treated as a tax upon *the security*. The term *property* is used in one case and the term *security* in the other.

This constitution was not written in the English language, and we have to go into the opinions of the supreme court of California to find out what it means. The supreme court of that State transposes it and takes a sentence out of the last clause and puts it into the first, so that it reads, according to its construction: "Except as to railroads and other quasi-public corporations, a mortgage, deed of trust, contract, or

other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby."

The CHIEF JUSTICE: Do you say it has been construed by your courts that if the tax is paid by the owner of security on that part of the property which is valued to the owner of the security that that tax does not become a part of the debt if it is paid upon that portion of the property which is valued to the owner of the security? Has it been held that if the security pays that tax that he cannot add it to his debt?

Mr. HAYMOND: No, sir. If the owner of the security pays the whole tax he can add to the debt the amount of the tax assessed against the mortgagor. He cannot add to the debt the tax paid upon the security. The constitution of California prohibits such a result, even though the parties may contract for it (Constitution of California, article XIII, section 5). Each party is to pay his own tax. If one pays the tax of the other he may add it to or offset it against the debt, as the case may be, but the State has a remedy against the entire property.

Mr. Justice MATTHEWS: The distinction is between the property and the security as subjects of taxation?

Mr. HAYMOND: Yes, sir. You express most clearly the idea which I have been trying to convey.

As interpreted by the supreme court of California it reads: "Except as to railroads and other quasi-public corporations, a mortgage, deed of trust, &c., shall be deemed and treated as an interest in the property affected thereby." In other words, instead of attempting classification, it establishes a general rule and excepts the property of railroad corporations and other quasi-public corporations, whatever that property may be, and not a class of property, from its operation.

This confusion arises from section 10 of the same article, which confers upon the State board of equalization the power to assess designated portions of railroads operated in two or more countries without regard to who owns that railroad property. It is, "All property, except as

hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated in the manner prescribed by law. The franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State board of equalization."

The deduction is allowed in the one case, under section 4, if the property is owned by an actual person or by a corporation not a quasi-public corporation. In the other case, under section 10, the jurisdiction of the board attaches, because the property itself (and it is railroad property alone there) is operated in more than one county. The discrimination in section 4 is not based upon the fact that the railroad is operated in more than one county. It is based upon ownership alone.

Mr. Justice FIELD: Is not that tenth section directed entirely to the mode of assessment?

Mr. HAYMOND: In one sense, yes; it is directed to the places where and to the class of officers by whom the assessment is to be made.

Mr. Justice FIELD: And when the property named is operated in more than one county this board assesses. Is not that the whole of the tenth section?

Mr. HAYMOND: Yes, sir; that is all there is of it, except that it declares *that all other property* shall be assessed by local assessors, and this clause requires local assessors to assess debts and credits, for they are declared by section 1 to be property. I will restate the proposition: If the property, be whatever kind of property it may, is owned by a railroad or other quasi-public corporation from that property the indebtedness cannot be deducted. If it be railroad property owned by a natural person or by a corporation not quasi-public, then the indebtedness must be deducted. If the railroad is operated in more than two counties, then the franchise of that railroad, its road-bed, roadway, and rolling-stock is assessed by the State board of equalization.

We say that the first is not a classification of property at all. It is the establishment of a general rule and an exception thereform based upon ownership alone. It comes when we consider the character of these corportions and the powers which they exercise—to the proposition which my brother Wilson admitted here, that you cannot assess the same kind of property to one man at a higher rate than you do to another because he is black or white or old or young.

Mr. Justice FIELD: Your printing is inaccurate in your brief. In section 4 it reads, "Except as to railroads and other quasi-public corporations." It should be, "Except as to railroad and other quasi-public corporations." It changes the sense.

Mr. HAYMOND: Now, I am not here to deny—this case does not require that I should—that a State cannot classify property. For the purposes of this argument I admit that a State may classify property, but it cannot base that classification, when an ad valorem tax is in question, upon ownership alone. It must be a classification of property, not of persons. This is not an attempt at classification. No man ever thought of classification in connection with section 4. It was a bold, open, barefaced attempt to impose upon one set of persons in that State who at that time were supposed to be obnoxious a tax to which no American citizen worthy of the name would have submitted. The persons against whom this was directed were as clearly described as though they had been mentioned by name. It stands upon the precise footing with that legislation attempted by California legislators under the constitutional provisions which prohibited the passage of special laws in relation to cities, towns, or villages, but which permitted classification. There the attempt was to do what? To pass laws making charters for cities having a population of over one hundred thousand. The courts looked behind the form. They saw there was but one city of the kind within the State, and they said it was an attempt to evade the provisions of the constitution, and that

it was as much special legislation as though the city and county of San Francisco itself had been mentioned.

Now, may it please the court, whoever heard of a classification of property by which the assessor was to make the assessment roll speak an untruth? Whoever in this country heard of the attempt to classify property by saying that one kind of property should be assessed at its cash value and another at five times its cash value, and still another at seven times its cash value? Perhaps they may have been such, but I have not heard of them. The classification with which I am familiar is this classification: Where the Legislature of the State declares that mills shall be assessed at one rate of taxation and that powder mills shall be assessed at another rate, but it is all mills and all powder mills.

The CHIEF JUSTICE: Is that a fair construction of this provision of the constitution? Is it anything more or less than this: That as to property generally, if there is a mortgage on it, it shall be divided for the purpose of taxation, and *that* portion covered by the owner of the security and that portion according to the owner of the property, so that railroad property shall be valued without division?

Mr. HAYMOND: Not railroad property, your honor, but property belonging to railroad corporations.

Mr. Justice GRAY: What is the fact about the extent to which individuals avail themselves in California of this right to get the franchise and the right to eminent domain? Are there any such railroads, except those owned by corporations?

Mr. HAYMOND: Yes, sir; there is a railroad in that State operated and run by an individual. It is a broad-gauge road, run for carrying passengers.

Mr. Justice GRAY: And not run incidentally to connect any mines?

Mr. HAYMOND: No, sir; nothing of the kind. It is one of the oldest railroads in the State.

Mr. Justice GRAY: And it stands on the same ground as a common carrier in all respects?

Mr. HAYMOND: Yes, sir; exactly. The findings (folios 118 and 120) show that at the time this assessment was made, and before, there were in California various railroads owned by individuals, partnerships, and corporations other than railroad corporations—by corporations such as mining and manufacturing corporations. In the case of the road to which Mr. Justice Gray refers the findings are (folio 119) that it "is and has ever been operated in more than one county and is of the same gauge as the road of the defendant, and has ever been operated for like uses and purposes." The laws of common carriers apply to all of these railroads alike. They apply alike to all carriers.

Suppose this judgment should be reversed and you should order judgment in the court below, and execution should issue upon that judgment In that event we would have a right to designate what portion of the property should be sold. Suppose we say that the railroad, road-bed, and rolling-stock shall be sold. The person who buys it does not want any franchise to run it. The corporation exists and holds its franchise, and the person operates the road just as did the corporation. All a man wants there is a plant, and he operates it under the law relating to carriers. He may acquire the land by purchase or by condemnation. Such is section 1001 of the civil code.

The CHIEF JUSTICE: Can he operate it by steam or can he cross the public highways with a steam carriage without express authority from the Legislature?

Mr. HAYMOND: He can operate it by steam, but neither a corporation nor natural person can run and operate a railroad through the streets of a city or town without the consent of the authorities. Both stand in this as in other respects upon the same footing.

The CHIEF JUSTICE: You say there is one railroad operated in your State in two or more counties owned by a single individual?

Mr. HAYMOND: Yes, sir.

The CHIEF JUSTICE: Is not that single individual, in form, incorporated under the laws of the State?

Mr. HAYMOND: No, sir; he bought it at sheriff's sale. The Pacific Improvement Company, a private corporation, owns and operates a road in two or more counties.

The CHIEF JUSTICE: It is a corporation, is it not?

Mr. HAYMOND: Yes, sir; but not a *quasi-public* corporation. If we do not owe any obligation to this Federal Government to-morrow, we can dissolve this corporation voluntarily if our debts are paid, and what becomes of the property? Why, the stockholders become tenants in common in regard to the real property and partners as to the personal property, and they can operate it just as does the corporation.

The CHIEF JUSTICE: Can you run that road as a railroad company would run it if you dissolve it as an organization?

Mr. HAYMOND: There is not a single distinction, and the very statute which I read gives the right.

The CHIEF JUSTICE: Does that give you as an individual the right to cross a public highway with a steam carriage?

Mr. HAYMOND: That law gives me leave to condemn that right as against the State. I can condemn it as an individual. If I want to enter a city or town, or if a corporation desires to enter a city or town leave of the city or town authorities must be obtained. We return to the proposition, that it is not in the power of man to find anything that a corporation can do in California which a private individual cannot do.

Mr. Justice GRAY: I understood you to say that this railroad owned by a private owner was bought by him at a sale on execution?

Mr. HAYMOND: Yes, sir. They seized this road and sold it, and that man bought the road-bed and right of way. It

is all property subject to execution and can be taken as such. We have franchises in California of the character the learned counsel on the other side refer to—the right to maintain a public ferry across navigable streams and take tolls; but our right is not to take tolls in specie at all. Our right is to take freightage under the common carrier's act, and we have no other right.

Upon this topic Judge Sawyer, at the circuit, in the Santa Clara case, says:

"That natural persons may own and operate a railroad in this State as well as corporations is manifest from the fact that this road is mortgaged under the authority of the laws of the State, and this of itself necessarily involves the power to sell and convey, in case the occasion arises, under a decree of foreclosure, to any party who is willing to pay the highest price for the road. It also appears as a fact in this case that a natural person purchased a railroad operated in more than one county, extending from Marysville, in the county of Yuba, to Oroville, in the county of Butte, under a decree foreclosing a mortgage, received his conveyance therefor, and that he has been operating it, and been assessed, and has paid taxes upon it for more than two years past. So, also, numerous statutes of the States were introduced in evidence granting the right te natural persons, not incorporated, to build and operate railroads. 'An act to provide for the construction of a railroad from Moquelumne city to Woodbridge, in the county of San Joaquin' (Statutes 1862, page 97) and an act authorizing the building of a railroad from the Embarcadero, on the bay of Petaluma, in Sonoma county (*id.*, 295), are examples of numerous acts of a similar character found scattered through the volumes of the statutes from that time to the present."

The attention of the learned judge was not directed to sections 1000 and 1001 of the civil code, which, taken in connection with the provisions of the code of civil procedure relating to eminent domain, gives the right to natural persons—to all persons—to own and operate railroads in the State of California.

THE CONSTITUTION AND THE LAWS OF THE STATE OF CALIFORNIA IN RESPECT TO PROPERTY BELONGING TO RAILROAD AND OTHER QUASI-PUBLIC CORPORATIONS PROVIDE FOR THE TAXATION OF THEIR PROPERTY AND ALSO OF A DEBT SECURED BY MORTGAGE THEREON, AND ALLOW NO DEDUCTIONS.

Here let me go a little further and unfold another chapter in this scheme. In the old constitution of California there was a provision that taxation should be equal and uniform. My brother, the attorney general, prints in his brief a speech which he made when he was a member of that convention, in which he says that the very purpose of taking out the words "equality" and "uniformity" was to destroy the decisions of the supreme court of the State that a tax upon property and a tax upon a debt secured by mortgage upon that property is double taxation, and that it cannot be collected from either. They put in the word "uniformity." He says the people wanted all securities and debts taxed, and we have got to take out that word, because the supreme court of California has said that when you make an ad valorem tax upon property, when you get all the land, houses, and money and things, you have got all there is to tax; that the mere fact that A gives a note for a thousand dollars to B does not add to the property of the State.

He says we want to avoid this thing, and we will strike out the phrase equal and uniform and put in its place the phrase that all property shall be taxed in proportion to its value. Then what do they do next? They tax the property and the debt secured by mortgage, but unless the mortgage property is owned by railroad or other quasi-public corporations they deduct from the property the value of the debt.

Is that classification? To-day, if the Chief Justice owns these lands and these railroads, and the bonds are outstanding in California and over the world, he may deduct the value of them from his property, and the owners of the debt shall pay the tax upon the debt, and he shall pay the tax upon the property which remains after deducting the value of the debt.

Mr. Justice MATTHEWS: Under the former constitution I understand you to say there was a rule which required equality?

Mr. HAYMOND: Yes, sir; and equality.

Mr. Justice MATTHEWS: And that was omitted?

Mr. HAYMOND: Yes, sir.

Mr. Justice MATTHEWS: So that the present constitution does not require equality?

Mr. HAYMOND: No, sir; unless it requires it under the other phrase, or unless the term taxation include equality. It says all property shall be taxed in proportion to its value.

Mr. Justice MATTHEWS: But, taking the whole constitution together and on the interpretation put upon it, that it does except railroad property or the property of the railroad corporation from what otherwise would be the universal rule, I understand your argument to be that the constitution of California, so construed, is itself in violation of the fourteenth amendment.

Mr. HAYMOND: Yes, sir.

Mr. Justice MATTHEWS: What particular provision in the fourteenth amendment do you rely upon as the foundation of an argument that equality of taxation must be the rule of all the States?

Mr. HAYMOND: I do not maintain that proposition, may it please your honor. I say that equality is part of the definition of taxation.

Mr. Justice MATTHEWS: Then on what ground do you complain of the taxation here, except that it is unequal?

Mr. HAYMOND: I complain of it because our property is taxed at a higher rate than similar property belonging to natural persons or to corporations not quasi-public, and we are in that respect denied the equal protection of the law, which has been interpreted to mean the protection which the general laws of the land afford.

A man is safe in any community where he can stand or fall upon laws applicable to all other people. But, as is said

in the Tennessee cases hereafter referred to, if the Legislature can single out one class of individuals and impose one class of laws as to them which do not apply as to others, then that is the worst species of tyranny.

Mr. Justice MILLER: I do not myself quite get at what you mean there by this inequality of the law.

Mr. HAYMOND: I am just coming to the point to show you.

Mr. Justice MILLER: Let me make a suggestion to you before you get to it. Do you deny the right of a State to tax whisky at a rate three times as high as it taxes corn meal?

Mr. HAYMOND: I say that may be done. It depends somewhat upon where the whisky is made.

Mr. Justice MILLER: What is there to take that case out of the word inequality or injustice of the fourteenth amendment by taxing one man's property higher than another's?

Mr. HAYMOND: If your honor submits that question to me for my individual opinion, I say I do not believe that that can be done; but I do say that that is a violation of the fourteenth amendment, and predict the time will come when this Court will so construe it, although you have not done it now, and it is not necessary, for the purposes of our case, that you should so construe it.

If the tax is laid by a rate upon all the whisky in the State at three per cent., while upon all the corn in the State the rate is two per cent., that is a classification, and the court below in this case has held that such a classification was a classification of property and admissible under the fourteenth amendment. But if a State law prescribed that all the whisky which belonged to Tom Jones should be taxed at the rate of three per cent., and that all whisky belonging to John Smith should be taxed at the rate of two per cent., that would be an unjust and unlawful discrimination, and would be obnoxious to the fourteenth amendment.

Mr. Justice MILLER: It comes back, after all, to what is a tax on property and what is a tax on land. I do not know anything in this country that is not a tax upon property, hardly. You may say, perhaps, that a tax on a man's calling is not a tax on property, but property must be owned by somebody or else it is of no value anywhere, and because a class of men own all of a certain class of property I do not see that the Legislature should be hindered for that reason from saying that the whisky that he owns should be taxed so and so or the money that he owns should be taxed or the railroad should be taxed. I have not got at the specific point of this argument, that that constitutional provision is not a provision for taxing railroad property.

Mr. HAYMOND: It is a provision for taxing property owned by railroad companies.

Mr. Justice MILLER: All railroad property, I suppose, is owned by companies.

Mr. HAYMOND: No, sir; the findings show that in California there is railroad property not owned by companies, while, on the other hand, railroad corporations own various kinds of property not classed as railroad property.

Mr. Justice MILLER: You have been arguing here for an hour nearly to show that there is no distinction; that corporations do not amount to anything; that they were only private people after all.

Mr. HAYMOND: Exactly. But why have I done so? To show that counsel cannot maintain the position that this is classification—to reduce their position to an absurdity. For if I have proved by the laws of the State of California that a railroad corporation exercises no power, has no rights or privileges which a natural person has not and may not exercise—and this I am sure counsel, in the close, will not deny in view of the code provisions which I have read—then it is clear that cannot be called classification of property which results in this: That if the property is taxed to-day at one rate because it is owned by a railroad or other quasi-

public corporation, and if sold to a natural person or to a corporation not quasi-public, then it is to be taxed at another and a lower rate, unless that can be called a classification which distinguishes between the property of blacks and whites, or between the property of old and young, or between the property of males and females. This, counsel admits, would not be lawful classification. There is the difference of color between blacks and whites, the difference of age between the old and the young, and the difference of sex between males and females. Under the laws of California there is no difference whatever, in a legal sense, between natural persons associated under the name of a railroad corporation, under the municipal laws of California general in their operation, and between the same persons associated in that State under any other name and for any other lawful purpose, or between persons not associated, but acting in their individual right; and certainly there is no difference in the powers which, under the laws of California, may be exercised by a private corporation and a corporation not quasi-public.

Mr. Justice MILLER: We have had this word "rate" before us several times. The rate of the tax and the amount on which it is to be assessed are different things. You do not mean to say that this railroad is taxed one or two per cent. on its value more than others?

Mr. HAYMOND: No, sir; I do not mean to say that in form. I mean to say that under the fourth section of article 13 of the constitution of California that all property-owners except railroad and other quasi-public corporations are, for the purposes of assessment, entitled to deduct from the value of their property the value of all debts secured by mortgage or deed of trust upon such property.

Mr. Justice MILLER: I say you must use language more closely.

Mr. HAYMOND: I am willing, so far as it is possible for me to do so, to come up to the standard which you fix.

Mr. Justice FIELD: The taxation is not different, but the

rate of assessment is different. In one case it is assessed twice as much as the other—the rate of taxation is the same.

Mr. HAYMOND: What I maintain is that to allow one person to deduct the value of a debt secured by mortgage upon his property and to deny this right to another is the equivalent of taxing the latter at a higher rate than the former.

Section 1 of article 13 of the constitution of California provides, in substance, that all property in the State shall be taxed in proportion to its value, and in defining the word *property*, as used in the section, declares that it includes moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership. If this section stood alone it would be clear that the full value of a tract of land must be assessed against its owner, notwithstanding the fact that it was mortgaged for its full value to secure an indebtedness due from the owner to the holder of the mortgage, and it is clear, also, that under this section, standing alone, the credits secured by the mortgage must also be taxed at their value to the owner of the credits. This is double taxation. The decisions of the supreme court of California, rendered after the discussion had gone on for many years and after full and elaborate arguments, settle this point.

Savings and Loan Society *vs.* Austin, 46 California, p. 415.
Burke *vs.* Badlam, 57 Cal., 600.

The decision in the case of the S. & L. Soc. *vs.* Austin antedates the formation of the new constitution.

The debates in the constitutional convention show clearly that the members of that body were thoroughly conversant with the effect of that decision, and that, to avoid double taxation as to all other persons except railroad and other quasi-public corporations, they inserted the provisions which are found in section 4 of article 13 of the new constitution, and which provide that a mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated

as an interest in the property affected thereby; that they should be so deemed and treated, except as to railroad and other quasi-public corporations, and that, except as to such corporations, the debt so secured should be deducted from the value of the property upon which the security rests. No clearer case of intentional discrimination could be made. That it was the intent and purpose of the framers of that constitution to impose double taxation, not only upon the railroad property, but upon all other property, real and personal, owned by such corporations, is established beyond even the possibility of a doubt. Department 1 of the supreme court of California, in its opinion filed in the case of the Central Pacific Railroad Co. *vs.* The State Board of Equalization (60 Cal., p. 35), concedes that there is no practical difference between a system which taxes the property of railroad corporations at a higher rate of percentage upon the value than is imposed upon other property and a system which establishes a mode of estimating the value of such property, which results in imposing a burden upon such property greater than is imposed upon other property.

The supreme court of California was either compelled to make this concession or to disregard its own decisions upon that subject. In Miller *vs.* Heilbron (58 Cal., 133) the Supreme Court of California, in construing the act of Congress conferring upon the States power to tax national banks, and limiting the power conferred by a provision "that taxation must not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of that State," adopted the construction of the Supreme Court of the United States in the case of The People *vs.* Weaver (100 U. U. S., 543), namely, that the phrase the "taxation shall not be at a greater rate than is assessed upon other moneyed capital," etc., means something more than that there should be no discrimination with respect to percentage on any valuation which might be made; *that it means, in taking the assessment, rate of assessment, and valuation together,* the taxa-

tion on shares of national banks should not be greater than on other moneyed capital.

In the case of Miller *vs.* Heilbron the facts were that the assessor, in making the assessment against the plaintiff's shares of stock in a national bank, was obliged to pursue the method prescribed in section 3640 of the political code, and could not, under that section, deduct from the valuation of such shares debts due from the plaintiff to citizens of the State.

The court held that the section under which the assessor acted constituted clearly a discrimination against the owner of national bank shares and in favor of the owner of credits, and that the former was assessed at a greater rate than the latter. Referring to the act of Congress which permitted the State to assess shares of stock in national banks, under certain restrictions, it held that the restrictions operated upon the State Legislature, and that the fact, whether in a particular instance the owner of national bank shares owes any debt, is immaterial; for, say the court, "By the laws of this State he is not permitted to deduct them if he does."

Section 3640 of the political code under which the assessment then in question was made violated the rule of equality and uniformity prescribed by the act of Congress, for which reason the court held that it neither had nor could have any force or effect against any one.

This Court will give great consideration to the supreme court of the State of California, in Miller *vs.* Heilbron, upon the laws of California, and when we apply the principles of that decision to the case in hand, and read section 4, article XIII, in their light, we must arrive at the conclusion that section four, in effect, declares that all property belonging to railroad and other quasi-public corporations shall be assessed at a greater rate than other property of the same kind is taxed; and if this be so I am quite accurate in saying that the provisions in section 4 of article XIII of the State constitution require that the property of railroad and other

quasi-public corporations shall be assessed at a *higher rate* than other property of the same kind, subjected to the same uses but belonging to natural persons or to corporations not quasi-public. This Court need not consider the question whether this makes an unjust and illegal discrimination against such corporations, for that matter has already been authoritatively determined by the supreme court of the State of California and by this Court.

If the fourteenth amendment to the Constitution of the United States, or the fundamental principles which underlie our form of government, limit the power of taxation to the imposition of burdens upon some rule of equality and uniformity, it follows that any law of a State, whether it be in the form of a statute or in the shape of a constitutional enactment, which violates the rule of equality and uniformity must fall.

In support of Miller *vs.* Heilbron, if support it needs, I cite the well-reasoned case of the National Albany Exchange Bank *vs.* Wells (18 Blatchford's Circuit Court Reps., 478.)

This Court, in the case of The People *vs.* Weever (100 U. S., 543), affirmed the same doctrine, and in every National Bank case where the question has been involved this Court virtually held that to allow one person to deduct from the value of his property the value of the debts secured by mortgage thereon and to deny this right to another is the exact equivalent of taxing the former at a lower rate than the latter.

I admit, for the purposes of this case, that States may classify property for taxation, but the framers of section 4 of article 13 of the constitution of California never for a single moment contemplated that they were classifying property. They had no such purpose in view. Their manifest purpose was, under the pretense of exercising the taxing power, to impose a burden upon one set of men in that State which they would not have dared to attempt to impose upon all.

Mr. Justice MILLER: Have you formulated any language in which you would have separated railroad property for taxation from other property?

Mr. HAYMOND: If I had attempted to classify railroad property for taxation I certainly would not have said that all property owned by railroad or other quasi-public corporations should be taxed at one rate or assessed at a higher value than the same property when owned by natural persons or corporations not quasi-public. I probably would have said, "All railroads within the State."

Mr. Justice MILLER: Not distinguishing between railroads belonging to corporations or private individuals?

Mr. HAYMOND: That is the idea exactly. You have expressed it clearly.

The CHIEF JUSTICE: Mr. Haymond, allow me to call your attention right here to this point. You say that the constitution leaves the matter in such shape that railways owned by corporations would be valued and taxed in a different way from railroads owned by private individuals?

Mr. HAYMOND: Yes, sir.

The CHIEF JUSTICE: Is that the statute under which this assessment was made?

Mr. HAYMOND: Yes, sir.

The CHIEF JUSTICE: I am speaking of the statute which carries this constitutional provision into effect. You say that the constitution confines it to corporations, to railroads owned by corporations?

Mr. HAYMOND: The constitution extends the exception to property owned by railroad or other quasi-public corporations, and does not confine it to railroads owned by corporations.

The CHIEF JUSTICE: But in the statute it says, "In such last-described book"—that is, the record book of railway assessments—"must be entered the names of the railways assessed by the board, the names of the corporation to which or the name of the person or association to whom each railway is assessed, the whole number of miles of railway in the

State, the number of miles thereof in each county," &c. Now, this statute fixes the mode of assessment of all railroads in the State, without regard to the question of whether they are owned by corporations or individuals?

Mr. HAYMOND: No; it does not fix the mode of assessment of all railroads owned in the State, but it does declare that the State board of equalization shall assess the franchise, road-bed, roadway, and rolling-stock of all railroads operated in two or more counties. Under the provisions of the first clause of the section, if they are not operated in two or more counties, they are assessed by the same local officers who assess other property.

The CHIEF JUSTICE: In the statute there is no discrimination?

Mr. HAYMOND: There is only the discrimination which I speak of in the section to which you refer; but section 3627 of the political code follows the provisions of section 4 of article 13 of the constitution.

The CHIEF JUSTICE: I do not desire to take up more of your time; I only wanted to refer to what the law was upon this subject.

Mr. HAYMOND: I am very glad to have these suggestions made, because I can well appreciate the difficulties under which the Court labors in arriving at what the law of the State is in this respect; and before leaving the matter I desire to call the attention of the Court to the fact that the section which the Chief Justice has just read answers the question as to whether railroads may be operated in California for natural persons. The section declares that the State board in making the assessment shall enter upon the list the name of the corporation to which or the name of the PERSON OR ASSOCIATION to whom each railway is assessed.

The discrimination of which I am here complaining is not the discrimination made by section 10 of article 13, but the discrimination made by section 4 of article 13 and by the laws passed carrying it into force. Section 10 of article

13 refers to the officers by whom the assessment shall be made. It refers to the officers by whom and to the place in which the assessment shall be made. It declares that "all property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated in the manner prescribed by law. The franchise, roadway, road-bed, rails, and rolling-stock of all the railroads operated in more than one county in this State shall be assessed by the State board of equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

The discriminations under this section rest upon a different footing from the discriminations made in section 4, and to those discriminations I will hereafter refer. I am now dealing with the discriminations relating, not to the officers by whom nor the place in which the assessment shall be made, but to the discriminations mentioned in section 4, the results of which are that the property owned by railroad and other quasi-public corporations is required to be assessed in a manner different from that in which the same property is assessed owned by natural persons or corporations not quasi-public, and the result of which is to increase the burden imposed upon property owned by railroad and other quasi-public corporations.

The classification made by article 4, if any such classification is made, is by ownership. The exception refers to property owned by railroads or other quasi-public corporations. As to their property, whatever may be its nature or character or whatever may be the use to which it may be put, no deductions are allowed; but the very moment any of their property—it makes no difference whether it be a railroad operated in one county or more than one county or whether it be prop-

erty of other character—passes by transfer or otherwise to a natural person, or to a corporation not quasi-public, then it is assessed, not under the exception contained in the section, but under the general rule established by the section, and the deductions in question are authorized; and it matters not when the ownership is changed whether the assessment is made by the State board of equalization under section 10 or whether it is made by the local assessors; these deductions must be made.

The CHIEF JUSTICE: I understand the provision of the constitution, and I can appreciate the argument you are making upon that, but I have not been able to find in the statute the language for the purpose of carrying it into effect.

Mr. HAYMOND: I have called your honor's attention to the language in section 3665 of the political code, and section 3627 of the same code is but a re-enactment of section 4 of article 13 of the State constitution.

Mr. Justice Field, at the circuit, in the San Mateo case, referring to the discrimination made by section 4 of article XIII of the State constitution, says:

"It is no answer to this discrimination to say that property in the State may be divided into classes, and different rates prescribed for them. Undoubtedly, property may be classified for purposes of taxation. Real property may be subjected to one rate of taxation, personal property to another rate. Property in particular districts may be taxed for local purposes, whilst property elsewhere may be exempt. Taxation on business in the form of licenses may also vary according to the calling or occupation licensed and the extent of business transacted; but even then there must be uniformity of charges with respect to the same calling or occupation in the same locality. It is, however, only with the taxation of property that we are concerned in this case; and the whole object of classifying property is that each class may be subjected to a special rate of taxation. There is no difference in the rate prescribed by the law of the State for the property of railroad corporations and the rate prescribed for the prop-

erty of individuals. There is only one rate for all property. There is, therefore, no case presented for the application of the doctrine of classification. The discrimination complained of arises from the different rule adopted in ascertaining the value of the property of railroad corporations as a basis for taxation, not from any different rate of taxation when the value is established. In all taxes upon property, whatever its form or nature, the property is taken as representing a pecuniary value, as standing for so much money invested. The tax is the rate per centum of this pecuniary value. The value being ascertained the law fixes the rate. The ground of complaint here is that the law requires a higher value to be placed upon the defendant's property than upon the property of individuals similarly encumbered, or rather requires the assessor of the defendant's property, in estimating its value, to disregard and set aside certain elements materially affecting its amount, which are to be considered in estimating the value of the property of individuals. It is not classifying property to make this distinction in determining its value. It is not classifying property to provide that the property of certain parties, which has a mortgage upon it, shall be assessed at its value after deducting the mortgage, and that the property of other parties, also having a mortgage upon it, shall be taxed at its full value without any deduction. That is not providing for a different rate of taxation for different kinds of property, but for unequal taxation according to the character of the owner."

Judge Sawyer, at the circuit in the San Mateo case, upon this topic, says:

"There can be no valid classification of property, under the *State constitution*, for the purposes of taxation based upon the uses to which it is applied, except so far as the use may give additional value to the property; and the principle under the *constitutional provision requiring all property to be taxed at its value* would only authorize the increase or modification of the assessment by adding the increased value so arising from the use. One owner may pasture his land, another raise wheat, cotton, or sugar cane, another plant a vineyard for the production of wine or an orange grove, another erect buildings upon his land and enjoy the rents arising therefrom, and another devote his time to the

construction and operation of a railroad. If any of these uses give additional value to the land or other property it must still be taxed at its actual value, be it greater or less. But under the constitutional provision *requiring all property to be taxed at its actual value*, it cannot be classified by its uses *for the purpose of applying other principles of taxation than value as a basis, or for the purpose of taxing it according to ownership, so as to make one class of owners, as such, pay more than another, or one class of owners pay the taxes that ought to be assessed against and paid by another class.* The State constitution does not profess to classify upon the basis of the uses to which property is applied. It recognizes no such principle in terms or by implication. It says nothing about uses, but classifies in terms by ownership, and includes all of the property of the same owners in its class for non-deduction of the value of the security—land and other property held for sale, as well as property used for operating railroads, or other corporate uses of quasi-public corporations, without making any reference whatever to its uses. The only rule by which any property is authorized to be assessed is according to its value. The constitution arbitrarily provides as to a particular class that they shall pay the taxes upon the interest—according to the constitutional definition of property—in the property held by another class of owners who are allowed to escape taxation altogether, and in this particular the laws do not bear upon or protect the former equally with the latter. It provides that railroads and other quasi-public corporations shall pay taxes upon property they do not own—shall pay other people's taxes. This discrimination against such corporations is not a taxation but a confiscation of their property, *not for the benefit of the public, for there are no more taxes collected in the aggregate, but for the benefit of other property owners, who thereby escape their share of the public burdens.* If the arbitrary discrimination and classification found in this case can be legally made under the National Constitution and the law of the land, then the subordinate State constitution or law can be so framed as to dispose of a man's rights in property of all kinds by arbitrary classification and definition, without regard to the real facts, circumstances, or conditions of the property. A person may, by such subordinate statutory provisions, be classified out of the equal protection of the laws guaranteed by the National Constitution, and, if so with reference to this pro-

vision, he can also be classified and defined out of uniformity in the operation of the laws in other particulars—out of the protection of due process of law and of the provision forbidding a law impairing the obligation of contracts or taking property for public use without just compensation, and, indeed, out of all the guaranties of the Constitution, State or National. I am not arguing that property of all kinds may not be taxed where it is found, provided all owners are put upon the same footing, but in this case there is a personal liability sought to be enforced against the defendant for taxes not imposed upon others in like circumstances, without any means provided for reimbursement, such as are applicable to others similarly situated, by the party who ought to pay the tax.

"For authorities, including decisions of the United States Supreme Court illustrating this point, reference is made to the San Mateo case (8 Saw., 302–'4).

"It is argued that the taxing of the whole value of mortgaged property of railroads and other quasi-public corporations to the corporation owning it, subject to the mortgage, while the same thing is not done with respect to the property of natural persons or other corporations similarly situated, is valid as being simply a *franchise* tax—a tax for the privilege of being a corporation—'a tax imposed as a return for privileges and powers not possessed by individuals.' It is further said that it is not material by what standard a franchise tax is measured—whether the tax is in gross or measured by receipts, the amount of property acquired, or by any other standard—and cases are cited from some of the States where a franchise tax is claimed to have been sustained on such principles, but this view wholly ignores the provisions of the State constitution itself on the subject. This is not and does not purport to be, in any sense, a *franchise* tax. A *franchise* tax is otherwise, in express terms, provided for. The constitution itself prescribes how a franchise tax shall be assessed, and that is, like all other property, 'in proportion to its value.' 'All property * * * shall be taxed in *proportion to its value, to be ascertained as provided by law*' (Art. XIII, sec. 1). 'The word property as used in this article and section is hereby declared to include money, credits, * * * *franchises*, and all other matters and things * * * capable of private ownership.' (*Ib.*)

"Again, 'the *franchise*, roadway, &c., of all railroads operated in more than one county in this State shall be assessed by the State board of equalization *at their actual value*' (*Ib.*, sec. 10). Thus the *franchises* of the defendant, under the constitution of California, can only be assessed, like other property, according to 'their actual value,' be that more or less. Their *franchises* have, therefore, already been otherwise assessed at their value—all the constitution will allow—and this discrimination is not and cannot be under the constitution of California a franchise tax. It has no reference to the franchise. It is simply in law, what it is in fact, an arbitrary and unjustifiable discrimination against railroad and other quasi-public corporations that cannot be maintained under the fourteenth amendment to the National Constitution, guaranteeing to every person the equal protection of the laws.

"Great stress was laid in the arguments of plaintiffs' counsel upon the growing and overweening power and greed of corporations, and it was vehemently asserted that this is a struggle between the people and the corporations for supremacy; that corporations, by corrupt means and through their large and widespread influence, have obtained and they are obtaining control of legislatures, &c.

"*If this be so, then it is of the utmost importance to every natural person in the United States that these guaranties of the fourteenth amendment to the National Constitution should be maintained in all their length and breadth. They are the only means of protection left to the people. If these unequal taxes can be imposed upon the class of corporations named in the Constitution the position of the parties can be reversed, and the unequal tax now thrown upon the corporations may hereafter be imposed upon the other parties. If these can be taxed without a hearing, then all or any class of persons can be taxed without a hearing; and if there is good ground for the alarm manifested by the counsel of the plaintiff, such corporations, when they acquire the deprecated power and control indicated, will not be likely to be slow in shifting the unequal burden to the other side. There is, therefore, upon that hypothesis, no safety to the people except in most rigidly maintaining the guaranties of the fourteenth amendment in their broadest scope.*"

FURTHER DISCRIMINATION.

There is still another discrimination made against property owned by railroad and other quasi-public corporations.

It is averred in the complaint in this case that many of the bonds which are secured by the mortgage upon the property of the Central Pacific railroad are held by citizens and *bona fide* residents of the State of California; that every year they have been assessed to those citizens and owners in that State; and it is found in this case that these averments are true, and that the local assessors have every year, in their respective accounts, assessed these debts to the owners thereof, and that the laws of the State do not allow nor have there ever been any deductions made from the value of the property by reason of such assessments. The purpose of section 4 was not only to make the discrimination first complained of, but was to impose a tax upon the full value of the property and also a tax upon the full value of the debt secured by the mortgage upon the same property.

The CHIEF JUSTICE: You say that the security is also taxed to the owner of the security?

Mr. HAYMOND: Yes, sir; and the record shows it very clearly.

The CHIEF JUSTICE: And paid by the owner of the security?

Mr. HAYMOND: Yes, sir; paid by the owner of the security, and it was so found in this case.

The CHIEF JUSTICE: And the railroad also?

Mr. HAYMOND: Certainly, sir. Every *bona fide* resident of California who owns any portion of the debt secured by the mortgage upon this property is taxed for the full value of that debt, and no deduction ever has been made or can be made under the laws of the State of California from the property on account of taxation of the security.

Mr. Justice MATTHEWS: That is, he is taxed on the bonds of the company, not on Government bonds?

Mr. HAYMOND: He is not taxed on Government bonds, but on the debt due from the company to him, evidenced by the bonds which he holds.

Counsel for the plaintiff in error assert that this Court will take judicial notice that the property of the Central Pacific railroad is mortgaged for more than it is worth. For the purpose of this case and this argument, I do not care whether you can legally take judicial notice of that fact or not. I will agree that the law is that you may, and if this is not sufficient I will and do stipulate it into these cases as a fact.

Now, let us see whether this is taxation according to values, and whether this constitution classifies railroad property as a separate and distinct class. Upon the assessment roll of the State and of the various counties the franchise, roadway, road-bed, rails, and rolling-stock of the Central Pacific railroad are all valued at their actual cash value. Upon the assessment rolls the stations, workshops, round-houses, steamboats, moles and wharves, and all other property belonging to the company is placed and valued at its actual cash value. If all of the debts secured by the mortgage upon this property were held by *bona fide* residents of the State of California they too would appear upon these assessment rolls at their actual cash value, and no deduction whatever would be made from the property of the company by reason of the assessment and taxation of the security. There is nothing in this record to show how much of this debt is owned by *bona fide* residents of the State of California, nor how much of the debt in addition to the property has been assessed and taxed there.

But let us assume, for the purpose of this argument, that all of those securities are owned in the State; let us assume, for the purpose of the argument, that the securities equal the value of the property; then the result is that the Central Pacific railroad is taxed for the full value of that

property and the security holders are also taxed for the value of their securities, making as to that company and its property a taxation and assessment of two dollars where only one dollar would be assessed and taxed if its property fell under the general rule.

Take the case of another railroad valued at one hundred thousand dollars, with seventy-five thousand dollars of debt secured by mortgages and all the securities held by *bona fide* residents of the State, and this property and the security would be assessed at one hundred and seventy-five thousand dollars, or in fact the property at seventy-five per cent. more than its value; take the case of another railroad valued at one hundred thousand dollars, with twenty-five thousand dollars of debt secured by mortgage and all the securities held by *bona fide* residents of the State, the assessment would be twenty-five per cent. above the actual value of the property; take the case of a railroad valued at one hundred thousand dollars without any indebtedness secured by mortgage and it would be taxed exactly at its value.

The tax provided for by the first section of article 13 of the constitution is an ad valorem tax upon the property of the State in proportion to its value, and when all the property in the State has been assessed and valued the purposes of this section are accomplished.

The assessment rolls should show the value of property in the State, but when you put in force the exception which allows all this property to be taxed and then allows the debts which are secured by mortgages upon it to be separately assessed and taxed, without any deduction from the property upon which they constitute a lien, you have made the assessment roll exhibit a value in excess of the combined value of all the property in the State.

The assessment rolls of a State should show the value of property subject to taxation within its jurisdiction, but the exception in article 4 and the provisions in article 1 intended

to discriminate against certain individuals declare that the assessment roll must be made to speak falsely.

Mr. Justice MILLER: Is that a fair interpretation, do you think?

Mr. HAYMOND: Yes, sir; unquestionably so, and this was the intention of these framers of the constitutional provisions. The learned attorney general, in his brief, quotes from a speech made by himself in that constitutional convention. In it he declares that the words "equal and uniform" should be stricken out of the constitution, and the words "taxation in proportion to its value" inserted in place thereof in order to escape the force of certain decisions which had been made by the supreme court of that State. These decisions went to the point that when you had assessed all of the tangible, visible property in the State the end of just taxation was reached, and that if you passed beyond this and assessed and valued debts secured by mortgage upon the property it was not taxation but confiscation.

The learned attorney general, in the argument which he quotes, states that the people had determined that debts secured by mortgage should be taxed, and virtually that these decisions should be reversed. But when he and the majority of his colleagues framed section 4 of article 13 they adopted as a general rule the principle of those decisions, and required that the value of debts secured by mortgage upon property should, when that property was assessed, be deducted from the value thereof, but from this provision excepted all property, whatever its nature and character, which might be owned by railroad or other quasi-public corporations, and as to that the constitution and laws of the State declare that both the property and security shall be assessed and taxed without any deduction whatever.

There is no question but this is the law of the State. But if it were not, the record in this case shows that the officers of the State in administering the law have so interpreted it and enforced it. So far as the result to be reached

in this Court, it matters not whether the discrimination is the result of the law or of its administration. The national courts, acting under the mandates of the National Constitution, are bound to protect the property from the illegal act, whether that illegal act be the result of the law or of its administration.

Mr. Justice MILLER: The constitutional provision is that the railroad property having been assessed, all this land and everything that affects the taxes on it shall be divided. If there are mortgages the mortgagee shall be taxed for his interest in the property and the railroad company for the balance.

Mr. HAYMOND: No, your honor. The constitutional provision and the law are exactly the reverse. It is that all property, of whatever nature or character, owned by railroad or other quasi-public corporations shall be assessed at its actual cash value, and that all debts secured by lien thereon and owned by *bona fide* residents of the State of California shall be assessed at their value without deduction. Mortgages are not taxed. It is the debt which is secured by the mortgage which is the subject of taxation.

In the case of property owned by railroad or other quasi-public corporations both the property and the debt, so far as it is owned by *bona fide* residents of the State, are taxed. In relation to the same kinds of property not owned by railroad and other quasi-public corporations the value of the debt is to be deducted from the value of the property; the mortgagor is to pay the tax upon the mortgaged property less the value of the debt; the mortgagee or holder of the debt is to pay the tax upon the security, and there is nothing like double taxation.

This is the way in which the law has been administered. The record shows it, and with all due deference I submit that the administration has been in exact accordance with the law. If Mr. Justice Miller owned one hundred thousand dollars' worth of real property in California and it was

mortgaged either to residents or non-residents of that State to secure a debt of fifty thousand dollars Mr. Justice Miller would be taxed for fifty thousand dollars and the owner of the security would be taxed for fifty thousand dollars, making in all a tax of one hundred thousand dollars.

But if Mr. Justice Miller should to-morrow transfer that property to a railroad or a quasi-public corporation, then, in accordance with the laws of California, that corporation would be taxed upon an assessed value of one hundred thousand dollars, and the holder of the security, if a *bona fide* resident of California, would be taxed upon an assessment of fifty thousand dollars, without the character or the use of the property having been changed in the slightest degree, but the change of the ownership would work out this result.

THE FACT THAT AGRICULTURAL LANDS BELONGING TO THIS COMPANY HAVE BY VIRTUE OF THE CONSTITUTIONAL PROVISION BEEN ASSESSED AT THEIR FULL VALUE, WITHOUT DEDUCTION, ON ACCOUNT OF THE DEBTS SECURED BY MORTGAGE THEREON IS MATTER FOR THE CONSIDERATION OF THE COURT IN THIS CASE.

The learned counsel who so ably opened this case for the people of the State says that the question as to whether or not the methods which may have been pursued in assessing the outlying lands was a valid method, or whether the constitution and laws of the State of California in relation to taxation of such lands are invalid, is not involved in this record, but in the very same breath he says that the constitution is on trial. That is true, but it is also true that in order to enable us to put that constitution upon trial before the judicial tribunals of the country we must show a legal interest in the question.

We are now attacking the scheme of taxation formulated in section 4 of article 13 of the State constitution, so far as

that scheme is exceptionable and affects only the property of railroad and other quasi-public corporations. We have shown here a legal interest in that question, and that our interest authorizes us in this proceeding to put the exception contained in that section on trial. Had we failed to show that we owned lands and such other property it might have been contended, although in our judgment the contention would have been without foundation, that we were in no situation to complain. For that reason we brought into the case all of the facts which tend to show that this exception was not the result of a *bona fide* attempt to classify property for taxation, but was an attempt to separate from the great mass of property in that community other property of like character, and to impose upon it a burden greater than it should bear, simply because it was owned by certain persons the identity of whom can be as easily established by the history of the times, of which you will take judical notice, and by the facts of this case as though they had been named in the constitution itself. We brought this special matter into the case in order that it might be what it is, a complete answer to the claim that this exception was a classification of property.

Two sections of land of the same value, situated in the same county, used for the same purpose, are both mortgaged for the full value to parties resident in New York. If one of these sections is owned by a railroad or other quasi-public corporation and the other by a natural person or by a corporation not quasi-public, then the one section under this scheme is taxed at its full value and the other is not taxed at all. Let the ownership be changed to-morrow and the taxed land of yesterday goes free, and the untaxed land of to-day is taxed at its full value.

The franchise, road-bed, roadway, rails, and rolling-stock of a railroad situated in California, operated either in one or two or more counties, owned by a natural person or by a corporation not quasi-public, and mortgaged for its full value

to parties resident in New York would not be taxed under these laws, but the value of the mortgaged security would be taxed. That tax would be a lien upon the property, and if paid by the owner of the property he could deduct the amount of that payment from the indebtedness secured by mortgage. If such property were to change hands to-morrow and become the property of a railroad or other quasi-public corporation, then such property would be taxed at its full value to the owner and the holder of the security would go free. They call this classification!

THERE IS NO MORE DIFFICULTY IN APPORTIONING THE TAX BETWEEN THE OWNER OF THE PROPERTY AND THE OWNER OF THE SECURITY, IN CASES OF PROPERTY OWNED BY A RAILROAD OR OTHER QUASI-PUBLIC CORPORATION, THAN THERE IS IN THE CASE OF PROPERTY OWNED BY NATURAL PERSONS OR BY CORPORATIONS NOT QUASI-PUBLIC; NOR IS THERE ANY MORE DIFFICULTY IN COLLECTING IT IN THE ONE CASE THAN THERE IS IN THE OTHER.

The learned counsel for the State say:

"When the constitution of the State was adopted, in 1879, this railroad company existed with its road completed and with mortgages upon it quite equal to, if not in excess of, the assessable value of the property, and we venture to assume that the Court will take judicial notice of so notorious a fact as that there were thousands of miles of railroad in that State heavily mortgaged, many of the bonds of which were held outside of said State, and that could not be reached for taxation by assessments against the holders."

"This property aggregated in value many millions of dollars (in this particular case alone), judging by the assessment, amounting to more than $20,000,000."

"The aggregate of the assessments in the cases now before the Court amounts to more than $50,000,000."

"That this enormous amount of property should bear its fair proportion of expenses of government will not be denied."

Who has ever contended that this enormous amount of property should not bear its fair proportion of the expenses of government?

Upon what authority does the learned counsel base his assertion that because many of the bonds of this company are held outside of the State the debts secured by mortgage cannot be treated precisely as they are treated by the constitution and laws of the State under the general scheme of taxation therein provided for?

Persons non-residents of the State of California hold debts secured by mortgages on the land of natural persons and the taxes are collected. Why may not the same be done in relation to the land or other property owned by railroad corporations? The same general scheme applies and is effectual to collect the taxes assessed against debts secured by mortgages made upon railroads not owned by natural persons and by corporations not quasi-public. The general scheme will apply as well whether the property is owned by a railroad corporation or by a natural person or whether the owner of the security resides in or out of the State. The taxes assessed in either event, if the general rule is applied, constitute a lien against the property, and that whether the assessment is made against the property or against the debts secured, and the tax under the general laws of the State could be collected by proceedings in equity for the enforcement of the lien. This the law provides for, and does apply it to every case except that of property owned by railroads or other quasi-public corporations, and this without regard whether the holder of the security is a resident of the State or not?

Now, take the case in hand. Suppose the State board of equalization was to disregard the exception contained in section 4; was to conceive that it was an unjust discrimination and nugatory because it violated the fourteenth amendment and National Constitution, and was to assess property owned by these corporations in the same manner

as other property is assessed, namely, the value of the property, less the value of the mortgage secured to the company and the value of the security, to Messrs. Tevis and Mills, trustees of the mortgage. The whole tax would be a lien upon the property and could be enforced by proceeding in equity. To these proceedings the railroad corporation and Messrs. Tevis and Mills are the proper and only proper parties. Messrs. Tevis and Mills are the trustees of an expressed trust, not only under the general rules of equity, but under the statutes of California; they are the proper and the only proper parties defendant. If they are residents of California summons could be served upon them personally. If they are not residents of California, the action being to foreclose a lien upon property within the jurisdiction of the court, a summons could be served by publication.

In such an action all of the questions raised here could have been determined. The equities could have been settled as between the parties and a judgment rendered that unless the tax was paid within a certain length of time the property should be sold. Then, if the tax was adjudged valid and legal, if the railroad company paid the whole of it, it would be entitled to a credit for the amount properly payable by the trustees upon the debt secured by the mortgage. On the other hand, if the trustees paid the whole of it they would be entitled to add the part properly payable by the railroad company to the debt secured by the mortgage.

In such an action if fences were included, if steamboats were included, if wharves or moles or any other property was included, and the assessment covered any species of property that went to business or operations, a court of equity might, upon proper evidence, have ascertained what the legal tax was and separated it from the illegal.

At this place I beg to call the attention of this Court to what Mr. Justice Field said upon this subject at the circuit years ago in deciding the Santa Clara case. He said:

"But, owing to misapprehensions that have largely prevailed in the community since the trial of the San Mateo case, which involved similar questions as to the effect of a decision against the State upon its right to subject railroad property to its just proportion of the public burdens, I will venture to make some suggestions as to the manner in which all such demands of the State may be enforced without infringing any principle of constitutional law. I am profoundly sensible of the irritation which a supposed desire to escape from the just burdens of Government naturally creates. The more powerful, the more wealthy the party, the more intense the feeling, and it finds expression in words of bitter complaint, not merely against the party, but sometimes also against any administration of justice which tolerates such supposed evasion. It is sometimes forgotten that the courts cannot supply the defects of the law nor always correct the mistakes of public officers nor the errors even of learned counsel. Certainly no member of this court would countenance the escape of anybody from his just obligations; but it cannot, with any seeming justice, declare that one party shall discharge an obligation which the law, properly administered, would impose upon another. Its duty is to administer the law as it finds it, not to make it, never forgetting that its administration must always be in subordination to those great principles for the protection of private rights which are embodied in our National Constitution and which are of priceless value to every one in the State.

"The railroad companies in California are taxed yearly to an amount exceeding $600,000. Their property is heavily encumbered with mortgages, amounting to much more than its actual value. Why should they not be allowed by law, if they pay this sum, a credit for it on their mortgages, as any natural person paying it would be allowed? Why should this unjust discrimination be made against them? Why should they by law be denied a credit for this more than $600,000 a year? Is there any justice in this denial? There is no difficulty in assessing and taxing the mortgages if the words 'except as to railroad and other quasi-public corporations' be eliminated from the constitution as invalid. The imaginary difficulty has arisen from the supposed necessity of taxing the debts which the bonds secured. As these are held in different parts of the country, some out of the

State, it would be impossible, it is said, to reach them. But the answer is that the taxes should be placed upon the mortgages, which, for purposes of assessment and taxation, are to be treated as interests in the property mortgaged, as much so as if it had been unconditionally conveyed to the mortgagees. The records of the different counties show the mortgages. The assessors can return to the board of equalization the value of the property covered by the mortgages in their respective counties, under section 3678 of the political code. The board would then have the value of the property of the companies and the amount of the mortages before them. The mortgage of the Southern Pacific Company being greater than the value of the entire mortgaged property, it would be assessed at such value. It could never, as a mortgage, be worth more than the property. If necessary or convenient, the assessment of the mortgage on the roadway, road-bed, rails, and rolling-stock could be stated separately from the value of the mortgage on other property of the company, and apportioned to the different counties as at present. The value of the mortgage on other property could also be apportioned as required by the political code. Why, then, should not this system be pursued? The State would thus collect all the taxes which it ought to collect. The tax, being a lien upon the property, could be enforced by a sale of the property, just as though it was levied on the property and not upon the mortgages. If the companies should then pay the tax they could by the law claim credit for it on their mortgages, and it would be deducted in the payment of the interest or principal of their bonds. Then justice would be done to the corporations as it is done to individuals. The same proceeding could be pursued with the first mortgage on the property of the Central Pacific Company; that also being greater than the value of the property, the State would be able to collect as large a revenue as by taxation on the property itself, and the company would have the benefit of the payment by a credit on its mortgage."

Counsel who managed these cases for the State in the beginning saw fit to commence an action at law. To attempt to saddle the whole burden upon the railway companies. To make them pay not only the tax which should be

justly paid by the holders of the security, but also to make them pay the taxes upon fences and steamboats, their business, their operations, and many other things over which the assessing tribunal had no authority or jurisdiction. It was an endeavor to hold the company responsible in a legal action for an unjust proportion of the public burden. It was not such a course as became a great State dealing with its own people. That such a course has not resulted in the loss of three million dollars to the State so far cannot be placed to the credit of those who in the name of the State attempted this injustice. That such was not the result must be credited to this railroad company. It paid all that was ever due to the State, although by the judgment of State and Federal tribunals and upon elementary principles of law there was no legal obligation or liability.

"THIS COMPANY HAS PAID ALL TAXES WHICH THE STATE COULD HONESTLY CLAIM."

Again, I ask who, authorized to speak for this company, has ever asked that it might be exempted from just governmental burdens? The records of the courts of California will show that this corporation never, before the adoption of the new constitution, but in one single instance disputed or refused to pay a tax. That in that case an arbitrary and unjust tax was imposed in one single county, and the judgment was in favor of the company and against the validity of the tax; but the amount justly due was, nevertheless, paid.

The records of this Court, in the cases already disposed of, show that the companies have voluntarily paid, upon assessments made by the State board of equalization, over two million dollars of taxes for which they were not legally responsible. Beside they have paid all the taxes levied upon their lands, all of the taxes assessed by the local assessors upon steamboats, wharves, moles, station-houses, and depots, which property was as much a part of their road as

that property over which the State board of equalization had jurisdiction.

The records in five cases now before the Court show that they have voluntarily paid, without prejudice to the rights of the State to recover the balance, more than they legally owed.

The record in this case shows that the whole tax claimed was three hundred and seventy-five thousand dollars. That three months before the suit was brought the company, without prejudice, tendered on account two hundred and seventy-five thousand dollars. That the tender was refused, and that the company has always kept it good. That it paid taxes upon its land amounting to one hundred and sixty thousand dollars, making, in all, more than two hundred and ten thousand dollars in excess of the amount of taxes which, according to equity and good conscience, it should have paid.

Against injustice and arbitrary exactions under the guise of taxation the company was forced in self-defense to stand. Its directors, in the interest of its stockholders, were bound to defend this property against this assault. The corporation, as the agent of the United States in charge of a military and postal road and of a military and postal telegraph, was alike, in law and in morals, bound to maintain to the last that the instruments and means which the United States had intrusted to its care to be used in peace and in war under the direction of that Government were not subject to destruction by the State. It occupies, as I shall hereafter show, towards that property, in that respect, the same relation which a captain in the navy bears to a national frigate or which an officer in the army bears to a national fort intrusted to his keeping. Had this corporation, without a struggle, betrayed that trust it would have deserved and received the same condemnation which the Peoples of the earth bestow upon the commander who betrays a post intrusted to his charge by a confiding people.

THE PROVISIONS OF SECTION 10 OF ARTICLE XIII OF THE CONSTITUTION OF CALIFORNIA IN RESPECT TO THE ASSESSMENT OF RAILROAD PROPERTY OPERATED IN TWO OR MORE COUNTRIES ARE IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN ANOTHER RESPECT.

1. *The owners of such property are denied the equal protection of the law.*

2. *Under such provisions property is taken without due process of law.*

I.

A Corporation is a Person Within the Meaning of the Fourteenth Amendment.

When this controversy first arose the State of California assumed the position that such corporations as this and others of like character were not persons within the meaning of the fourteenth amendment, and therefore not entitled to its protection. Much time and learning were spent upon both sides in discussing this question, but the position taken by the defendant has been fully sustained by this Court.

When the case of Santa Clara County *vs.* The Southern Pacific Railroad Company (118 U. S., 394) came on for argument in this Court Mr. Chief Justice Waite said:

"The Court does not wish to hear argument on the question whether the provision in the fourteenth amendment of the Constitution which forbids a State to deny to any person within its jurisdiction the equal protection of the law applies to THESE corporations. We are all of the opinion that it does."

Had the supreme court of California in the beginning taken this view of the question it is probable that none of these cases would have ever reached this Court.

McKinstry, justice, delivering the opinion of the supreme court of the State of California in the case of the Central Pacific Railroad Company *vs.* The Board of Equalization (60 Cal., p. 58), followed the opinion of Mr. Justice Woods, delivered when a circuit judge in the case of the Insurance Company *vs.* The City of New Orleans, and held that the word "person" in the fourteenth amendment did not include corporations. Said Mr. Justice McKinstry:

"It may be urged that there is no practicable difference between taxing railroad corporations at a higher rate or percentage upon the value of their property than is assessed upon the property of others, and establishing a mode of estimating the value of their property which results in the payment by them of more than is paid upon like property by others; but, if this be true, are the provisions of the State constitution in conflict with the fourteenth amendment of the Constitution of the United States?"

He answers this question by holding that they are not in conflict, because the word "person," in the fourteenth amendment, does not include corporations. Had he held to the contrary, there would seem to be no question, judging from his statement of the case, that he would have held, and the Court would have sustained him, that the tax was unequal, and therefore prohibited by the fourteenth amendment.

The supreme court of California has never in any case decided that the scheme found in the State constitution for the taxation of railroad property operated in more than one county was constitutional. In the case of the People *vs.* Bd. Sup. of Sacramento (59 Cal., 325) it said, "if the constitution is constitutional;" and in C. P. R. R. *vs.* Board of Equalization (60 Cal., 35), it held that a corporation was not a person, and therefore could be discriminated against.

AN OBLIGATION RESTS UPON EVERY PROPERTY-OWNER TO CONTRIBUTE HIS PROPORTIONATE SHARE TO THE SUPPORT OF THE GOVERNMENT.

The System to Enforce this Obligation.

To enforce this obligation the constitution of the State of California provides a system applicable to the great mass of property, the salient features of which are that all property shall be taxed in proportion to its value, to be ascertained as provided by law (art. XIII, section 1); that property shall be assessed in the county, city, or district in which it is situated, in the manner prescribed by law (art. XIII, section 10); that the boards of supervisors must equalize the valuation of the taxable property of the county (art. XIII, section 9), and that a State board of equalization shall equalize valuations as between the counties (*id*).

This system requires legislation to carry it into effect—the manner of assessment and the means by which the proportions are to be ascertained are left to legislation, except in so far as means for the latter purpose are found in the constitutional requirements relative to the boards of equalization. The legislation providing the manner of assessment and the means of ascertaining proportions must be had in subordination to the constitutional provisions that "all laws of a general nature shall have a uniform operation" (art. I, section 12); that "no local or special laws" shall be enacted "for the assessment or collection of taxes" (art. IV, section 25, subdivision 10); that "privileges and immunities" shall not be granted to any citizen or class of citizens "which upon the same terms shall not be granted to all citizens" (art. I, section 21), and that no person shall "be deprived of life, liberty, or property without due process of law" (art. I, section 13).

All of the safeguards compatible with the power involved are thrown around its exercise. The right of local self-government is acknowledged, for the assessment must be made by local officers; that each person is to pay a local tax in proportion to the value of his property is admitted in the creation of a local board to adjust proportions; that the State

tax is to be apportioned so that equality is preserved between the tax-payers of different localities a State board has been created to adjust proportions between the localities; but, above all, the right of every person to be heard at some point of time before his liability becomes fixed is recognized as a fundamental principle.

Departure from the System.

Having instituted this system—co-extensive in its operation with the territorial limits of the power levying the tax and including within its scope all kinds of property—the same constitution provides: "The franchise, roadway, road-bead, rails, and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State board of equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located in proportion to the number of miles of railway laid in such counties, cities and counties, towns, townships, and districts."

Franchises, roadways, road-beds, rails, and rolling-stock, as separate and distinct classes of property, are not withdrawn from the operation of the general rule, for all such property operated in a single county is governed by the general rule.

Property situated partly in one county and partly in another is not, as a class, so withdrawn, for land and houses so situated fall within the general rule.

Property operated in more than one county is not, as a class, so withdrawn, for telegraph lines, water ditches, flumes for transporting lumber for hire, stage and freight lines, turnpike roads, and other property so operated falls within the general rule.

If a classification based upon use is admissible, none such has been made, for all property used in more than one county has not been included.

If a classification based upon ownership is admissible, none such has been made, for all property owned by persons operating in more than one county has not been included.

Locomotives, as a species of property, are not to be assessed by the State board; but whether they are to be so assessed is made to depend upon whether they are operated in more than one county.

No class or genus or even species of property has been separated from the great mass and made subject to a special rule, but certain property has been taken out of the rule applicable to its species, and has been subjected to the special rule, and, as to it, none of the safeguards thrown around the enjoyment of other like property have been preserved.

No local assessor may fix its value; no local board may consider it in adjusting proportions for local taxation. Its owner may not appeal to the local tribunal open to the owners of other property (State Board of Equalization *vs.* Board of Supervisors of Sacramento County). The clause of the constitution which attempts to confer the whole power of valuation upon the State board of equalization is arbitrary and self-executing. The board may execute its power unrestrained by the established principles of private rights and distributive justice.

Dangerous and Unusual Powers Claimed.

The power of this board under the constitution is strongly, but accurately stated by the attorney general in his brief filed in the supreme court of California in the case of The San Francisco and North Pacific Railroad Company *vs.* The State Board of Equalization (Brief, p. 11). Says the learned attorney general:

"There is nothing in the constitution or statutes * * * pointing out specifically the manner to be pursued by the

board in making assessments and fixing valuations. This being so, it may adopt such a mode of proceeding as appears to it suitable and proper. * * * If the board has adopted no general rules applicable to all cases, then whatever manner is adopted by the board to make the assessment complained of becomes the rule of the case. The board, having authority to make rules for its government, can change such rules as often as it sees fit; can adopt a new rule for each case that comes before the board if it desires so to do."

The supreme court of California in the case above cited fully sustained the position taken by the learned attorney general.

From the time of the establishment by James II of the "high commission" to the time of the creation of the State board of equalization in California, no tribunal has existed, either in England or America, *which ever claimed* the right to deal with life, liberty, or property subject to no rules except those of its own pleasure and changeable at its own will.

It becomes this Court to pause before giving ear to the monstrous pretensions of the State board of equalization, voiced by the attorney general and upheld by the supreme court of California. Nearly two centuries have elapsed since the unlimited power to deprive the citizen of property except in accordance with the "law of the land" has been asserted in any country where the English language prevails. It is historical that the "high commission" dared not enforce its judgments against property, because an attempt to do so would enable the party injured to invoke the jurisdiction of the common-law courts; that the solicitor general shrank from facing such a court, *packed even though it was*, with a claim that the "high commission" in passing upon property rights "could make rules for its own government, change such rules as often as it saw fit, and adopt a new rule for each case if it desired so to do."

Lord High Steward Jeffries' answer to the Bishop of London descriptive of the powers of that tribunal—"This court does not proceed upon written allegation; its pro-

ceedings are summary and by word of mouth; no fixed mode of procedure; no rules of evidence govern its movements"—is the same description which the attorney general gives of the powers of the State board of equilization. The existence of unlimited power, both the attorney general and the supreme court of California feel must be maintained or all proceedings of the State board of equalization applicable to the case in hand must fall.

The people of the United States have ordained (sec. 1, art. XIV, Const. of U. S.) that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * * nor deny to any person within its jurisdiction the equal protection of the law."

These inhibitions upon the States apply "to all the instrumentalities and agencies employed in the administration of its government."

Ah Kow *vs.* Nunan, 3 Sawyer, 157.

"It is doubtless true that a State may act through different agencies—either by its legislative, its executive, or its judicial authorities, and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another."

Virginia *vs.* Rives, 100 U. S. R., 318.
Ex Parte Virginia, *id.*, 339 and 346.

The language of the fourteenth amendment, in so far as it deals with "privileges and immunities," is not new, even to the Federal Constitution.

The second section of article IV of the Federal Constitution declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

The section last cited has universally been held, among other things, to mean that the citizens of all the States shall

have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the State in the same manner as the property of the citizens of the State is protected, and that such property shall not be liable to any taxes or burdens to which the property of the citizen is not subject.

Campbell *vs.* Morris, 3 H. & McH., 554.
Corfield *vs.* Coryell, 4 Wash., 361.
Ward *vs.* Morris, 4 H. & McH., 338.
Wiley *vs.* Palmer, 14 Ala., N. S., 632.
Crandall *vs.* State, 10 Conn., 343.

To maintain the validity of section 10 of art. XIII of the constitution of the State of California it must be held that every other tax-payer in a county except the parties in interest here may apply to the local board of that county, acting in a judicial capacity, to redress a wrong done by an assessor in the valuation of his property or to relieve him of a burden not equally borne by others, but the parties in interest here cannot so apply. Can a law which admits of a proposition so monstrous be upheld in the very face of a constitutional provision which may be summed up in a single sentence, "The equality of all before the law?"

The new constitution of California (art. II, section 11) provides that "all laws of a general nature shall have a uniform operation," and in section 21, art. I, makes the declaration, "nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." The language of these clauses which limit the power of the Legislature, if we substitute the word "persons" for "citizens" in the last clause, would be the exact equivalent of the language of the fourteenth amendment to the Federal Constitution, which limits the power of the States:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States, * * * nor deny to any person within its jurisdiction the equal protection of the laws."

If this proposition be correct we shall have but little difficulty in making the application to this case. To support it we have the judgment of the court in Brooks *vs.* Hyde, 37 Cal., 376, '77, '78. That case arose under the old constitution, and the question involved was the construction of section 11 of art. I of that constitution, "That all laws of a general nature shall have a uniform operation." In that case Mr. Justice Sanderson, delivering the opinion of and speaking for a majority of the court, said (Brooks *vs.* Hyde, 37 Cal., pp. 376, 377, and 378):

"Whatever of difficulty there may be in comprehending, when by itself considered, the precise office which this clause of our constitution was designed to perform, it is removed when we read it in connection with the context of the constitution from which it was manifestly borrowed.

"As a matter of history it is well known that our constitution is in many respects copied from that of Iowa. Upon motion of Mr. Gwin the constitution of Iowa was adopted by the constitutional convention as a basis for ours, for the reason, as stated by him, that it was one of the latest and shortest. (Debates of Convention, p. 24.) The first article was reported by a committee of which Mr. Norton was chairman, and, as first reported, consisted of sixteen sections, including the one in question, bearing the same number which it now has. Speaking of the report, Mr. Gwin said the first eight sections were from the constitution of New York and all the others were from the constitution of Iowa. (Debates of Convention, 31.) So far as it goes section 11 is a *verbatim* copy of section 6 of article I of the Iowa constitution, with the most important part left out. The latter section reads as follows:

"'SECTION 6. All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.'

"Here the meaning of the first clause of the sentence, which, by reason of the 'glittering generality' of the language, when by itself considered, is obscure if not unintelligible, is explained and made clear by the latter clause, which serves as a definition to the first. The first clause is the shell, and the latter is the meat; and it is a little surprising that our constitutional convention, if unwilling to take both, should choose the former. Viewed through the medium of the latter clause, the meaning of the first is made so obvious that they may not have detected its intrinsic obscurity, and with a view to brevity may have concluded to take the rule without its definition. However that may be, the meaning of the clause, as used in the Iowa constitution, is obvious, and we must presume that when our constitutional convention borrowed the language they also borrowed the meaning, and designed that it should establish the same rule of legislative action which, by express definition, it is made to establish in the constitution from which it was taken.

"I am, therefore, of the opinion that the true intent and meaning of section 11 of article I of our constitution is to the effect that the Legislature shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. Thus interpreted, it affords a reasonable and salutary restriction upon legislative power, and, in my judgment, any other reading would render it meaningless and absurd.'

Mr. Justice Crockett expressed no opinion and Mr. Justice Rhodes dissented. The reasons for his dissent are not given, but from his well-known views it was not because the majority of the court had held the rule too strict, but just the reverse.

In Ward *vs.* Flood (48 Cal., 50) Chief Justice Wallace, speaking for the court, says:

"The protection of law is indeed inseparable from the assumed existence of a recognized legal right through vindication of which the protection is to operate. To declare, then, that each person within the jurisdiction of the State shall enjoy the equal protection of the laws is necessarily to

declare that the measure of legal rights within the State shall be equal and uniform."

In Guy *vs.* Hermance (5 Cal., 74) the court say:

"The Legislature * * * cannot except one case or one party from the operation of a general rule of law, either as to the right *or as to the remedy.*"

If these decisions are sound it is clear that the clause cited from section 1, article XIV, of the Federal Constitution must be construed to mean precisely the same thing as the clauses cited from the State constitution.

If we were here assailing a legislative enactment making the discrimination in question it would be clear that the enactment could not stand in the face of sections 11 and 21 of article I of the State constitution.

These sections have no application to the valuation of and taxation of the property of railroad and other *quasi-public* corporations, for it is said that the framers of the constitution intended to and did separate the property of such owners from the general mass of property in the State, and by the provisions of section 4 of article XIII of the State constitution applied a different rule to its valuation for taxation from what had been applied to the same kind of property owned by natural persons and corporations not *quasi-public.*

In this case the want of uniformity and equality in rights and privileges finds its source in the constitution. It is the constitution which gives to one person the right to appeal to a local board and denies the right to another. It is the constitution (section 4, art. XIII) which makes the other discriminations of which the defendant complains.

But this places the plaintiff in no better position, for if sections 11 and 21 of article I of the State constitution would in themselves and standing alone deny the power to the Legislature it must follow, as a logical result, that section 1

of article XIV of the Federal Constitution, which is in substance the equivalent of the sections of the State constitution cited, has no less effect than to deny the power to the State.

The discriminations complained of are—

1. A different manner of assessment.

2. Denial of appeal to local board; and,

3. That none of the safeguards which the law throws around the assessment and valuation of other property are applied.

Assessment of the Essence of Taxation.

An assessment is of the very essence of taxation.

"*Levy* and *assessment* have very different meanings. The levy of taxes is a legislative function and declares the subject and rate of taxation."

Burroughs on Taxation, 194.
Cooley on Taxation, 244–'5.

"Assessment is a quasi-judicial act, and consists in making out a list of the tax-payers and taxable property and fixing its valuation for appraisement."

Hilliard on Taxation, 290.

"The distinction is the difference between prescribing a rule of action and administering that rule to persons and subjects that fall within its provisions. * * * A law which levies a tax and provides for its assessment will not justify the collection of a tax until the assessment is first made. To attempt otherwise would be equivalent to attempting to execute a levy against a person or thing before it has been judicially ascertained or determined that such person or thing was amenable to its provision. There must be an assessment, either made pursuant to the levy or adopted as the basis of the levy, else there can be no lawful collection of taxes."

In Hilliard on Taxation, 291, it is said:

"Assessment is so far an indispensable incident to taxation that no right of action arises until a legal assessment is made."

So, in Cooley on Taxation, 259, it is said, citing many authorities, that "of the necessity of an assessment no question can be made. Taxes by valuation cannot be apportioned without it. Moreover, it is the first step in the proceedings against individual subjects of taxation and is the foundation of all which follow it. Without an assessment they have no support and are nullities."

"An assessment made as directed by law is an indispensable basis for the support of the tax that may be levied upon it."

People *vs.* Hastings, 29 Cal., p. 451.

There Must be Uniformity in the Mode of Assesssment, as Well as Equality in the Rate of Taxation.

Cooley on Constitutional Limitations, 3d ed., p. 622, says:

"But, whatever may be the basis of taxation, the requirement that it shall be uniform is universal. To render taxation uniform in any case two things are essential. The first of these is that each taxing district should confine itself to the object of taxation within its limits. The second essential is that there should be uniformity in the *manner of the assessment* and approximate equality in the amount of exactions within the district." (P. 624.)

Every attempt to evade this rule must fail, no matter in what form the attempt is made.

In Knowlton *vs.* Supervisors of Rock County, 9 Wisconsin, 410, the facts were that the city of Janesville included within its territorial limits not only the land embraced within the recorded plat of the village and its additions, but also a large quantity of adjacent farming or agricultural lands. The Legislature passed an act declaring that in no case should the real and personal property within the limits of the city and not included within the limits of the recorded plat be subject to an annual tax to defray the current expenses of said city exceeding one-half of one per cent.

Under the charter of the city other property was liable to an annual tax of one per cent. The Legislature within the same taxing district undertook to provide that a portion of the property should be taxed at one rate in proportion to value and another portion at a much lower rate.

"It was contended in argument" (says the court) "that as those provisions fixed one uniform rate without the recorded plats and another within them, thus taxing all the property without alike and all within alike, they do not infringe the constitutional provision of equality and uniformity; or, in other words, *that for the purposes of taxation the Legislature have the right arbitrarily to divide up and classify the property of citizens, and having done so they do not violate the constitutional rule of uniformity, provided all property within a given class is rated alike.*" "The answer to this argument is that it creates different *rules* of taxation, to the number of which there is no limit except that fixed by legislative discretion, while the constitution establishes but one fixed, unbending, uniform rule on the subject. It is believed that if the Legislature can, by classification, thus arbitrarily and without regard to value discriminate in the same municipal corporation between personal and real property within and personal and real property without a recorded plat they can also by the same means discriminate between lands used for one purpose and those used for another, such as lands used for growing wheat and those used for growing corn or any other crop; meadow lands and pasture lands; cultivated and uncultivated lands; or they can classify by the description, such as odd-numbered lots and blocks and even-numbered ones or odd and even numbered sections. Personal property can be classified by its character, use, or description, or, as in the present case, by its location, and thus the rules of taxation may be multiplied to an extent equal in number to the different kinds, uses, descriptions, and locations of real and personal property. We do not see why the system may not be carried further and the classification be made by the character, trade, profession, or business of the owners, for certainly this rule of uniformity can as well be applied to such a classification as any other, and thus the constitutional provision be saved intact. Such a construction would make the constitution operative only to the extent of

prohibiting the Legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the Legislature, 'You shall not discriminate between single individuals and corporations, but you may divide the citizens up into different classes, as the followers of different trades, professions, or kinds of business or as the owners of different species or descriptions of property, and legislate for one class and against another as much as you please, provided you serve all of the favored or unfavored classes alike,' thus affording a direct and solemn sanction to a system of taxation so manifestly and grossly unjust that it will not find an apologist anywhere—at least, outside of those who are the recipients of its favor. We do not believe the framers of that instrument intended such a construction, and therefore cannot adopt it."

An enactment of the Legislature of the State of Arkansas for raising revenue to support the government of the State, among other things provided that a tax should be levied, first, on all lands within the State, and, second, upon all town lots and improvements thereon, and provided that in valuing property in the first class no reference should be had to the improvements thereon, but that all town lots and the improvements thereon should be included in the valuation. In Pike against the State (5th Arkansas, p. 206) the enactment in question was challenged upon the ground that it conflicted with the provisions of the constitution of that State, which ordained that "all property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State." (Constitution of Arkansas, art. VII, title Revenue, sec. 2.)

The court said:

"From the view which we have taken, not only of the provision above quoted, but of every part of the constitution, we consider the rule there prescribed to be this, that prop-

erty of every character and description upon which a State tax may be levied must be taxed in proportion to its real and true value, and according to that basis be made to contribute to the revenue of the State; and that no portion of any distinct genus or species of property upon which such tax is imposed can ever be exempt therefrom. Therefore, if such tax be at any time laid upon land, no lands within the limits of the State, except such as are or may be exempt by some authority superior to our State constitution, can be legally exonerated from the imposition, and it matters nothing whether the land be situated in a city, town, or village or in one portion of the State or another, because the rule is general and inflexible, comprehending in such case all lands subject to the jurisdiction of the State and liable to be taxed by her authority."

And again:

"This rule we considered so great and comprehensive as to embrace every description of property upon which a tax may be laid to raise any portion of the State revenue; and the Legislature possesses no power to restrict its operation to such lands or improvements thereon or to any other property subjected to such taxation as may be situated in any specific portion of the State or in any sectional or legal division or subdivision thereof, because no such restriction can possibly exist if the tax imposed be equal and uniform throughout the State.

"Now, it is equally certain that land, by being divided, surveyed, or laid out into small parcels, tracts, or lots and distinguished from other lands by the additional appellation of 'town lots' does not, either in legal contemplation or in fact, change its original character or quality or lose its original and still legal and appropriate name, but remains of the same genus or class of property to which it belonged before it was so divided or had applied to it the additional name or designation 'town lots.'"

In the Exchange Bank of Columbus *vs.* Hines (3 Ohio St. R., 15) it is said that—

"Taxing by a uniform rule requires uniformity not only in the *rate of taxation, but also uniformity in the mode of the*

assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of the assessment as well as in the rate of taxation; but this is not all. The uniformity must be coextensive with the territory to which it applies. If a State tax it must be uniform over all the State; if a county, town, or city tax it must be uniform throughout the extent of territory to which it is applicable; but the uniformity in the rule required by the constitution does not stop here. It must be extended to *all property* subject to taxation, so that all property may be taxed alike equally, which is taxing by a uniform rule.

"A tax is equal and uniform which reaches and bears with the like burden upon all the property within the given district, county, etc. It bears the like burden when the *valuation of each parcel is ascertained in the same mode*—the mode prescribed by law—and when it is subject to the same rate of taxation as other property within the district, county," etc.

People *vs.* Whyler, 41 Cal., 335.

No Appeal to Local Boards.

That there is no appeal to local boards of equalization has been determined by the supreme court of California.

State Board of Equalization *vs.* Sacramento Co. (59 Cal., 325).

Department No. 1 of the supreme court of California, in discussing the point that the system challenged violates the fourteenth amendment, says:

"We are unable to see how the fact that the value of one kind of property is to be ascertained by one officer or board and the value of another kind of property by another officer or board, each clothed with the duty and responsibility of ascertaining the actual value, can be held to operate a deprivation of legal protection to the owners of either kind of property."

In reply, we admit there might be two such tribunals established, each surrounded with the same safeguards, the

operations of neither of which would amount to a deprivation of legal rights; but the State board of equalization does not answer the description, and we will endeavor to point out why, although the *declared* end of its proceedings and that of the local boards are the same, viz., the ascertainment of "actual values," yet the inevitable operations of the State board is to deprive persons of property without due process of law.

At this point let me impress upon this Court that the validity of a tribunal to pass upon laws which divest one of life, liberty, or property is not to be determined by the fact that justice is the result at which the tribunal is directed to arrive or is the declared purpose of the law.

No tribunal has ever been established, no laws have ever been enacted in a civilized country, no matter how arbitrary were the powers to be exercised or how flagrant were the acts to be done under the laws, but the end of each was declared to be the promotion of justice.

The barbarous clauses of the Missouri constitution, which made outlaws of ministers of Christ, because, in obedience to the ordinances of their Master, they had sympathized with persons supposed to be guilty of political crimes, were enacted in the name of patriotism.

The tribunal which, but for the interposition of the Federal judiciary, would have murdered Milliken was created to administer justice.

But, to carry the argument of department No. 1 of the supreme court of the State of California, to its logical result, Milliken could not be heard to complain, because his rights were not passed upon by ordinary courts; for the tribunal which tried him was, like the courts, clothed with the "duty and responsibility of vindicating the innocent and punishing the guilty."

The Provisions of Section 10 of Article XIII of the State Constitution which Provide for the Assessment of Railroad Property Operated in Two or More Counties, if Enforced, Would Deprive the Owners Thereof of Property without Due Process of Law.

Section 1 of Article XIV of the Federal Constitution declares:

"Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

This is the mandate of the Federal Constitution. Let us try the provisions of the constitution of California relating to revenue by this supreme rule:

GENERAL SYSTEM.	SPECIAL SYSTEM.
1st. The tenth section of the 13th Article, except as to assessments of railroad property, requires legislation to enforce it.	So much of the tenth section of the 13th Article as provides for the assessment of railroad property is self-executing and autocratic.
2d. The statute enforcing the tenth section of the 13th Article requires all taxable property to be assessed by the local assessor at its full cash value. "Full cash value means the amount at which the property would be taken in payment of a just debt due from a solvent debtor."	Railroad property enumerated in the tenth section of the 13th Article shall be assessed by the State Board of Equalization at its actual value; but "actual value" is not defined nor is any rule prescribed for the government of the State Board in ascertaining or determining it.
No local or special law shall be made "for the assessment or collection of taxes.") Art. IV, sec. 25, sub. 10.)	Franchises, etc., shall be assessed under a special law (Art. XIII, sec. 10), and taxes may be assessed and collected by special laws.
All persons may appeal from the assessor to the local Board of Equalization. (Art. XIII, sec. 9.)	The owners of railroads operated in two or more counties shall not appeal to the local Board of Equalization. (Art. XIII, sec. 9.)
All property shall be assessed in the county in which it is situated. (Art. XIII, sec. 10.)	Franchises, etc., of railroads operated in more than one county shall not be assessed in the county in which they are situated. (Art. XIII sec. 10.)

All property shall be assessed in the manner prescribed by law. (Art. XIII, sec. 10.)

Franchises, etc., of railroads operated in more than one county shall not be assessed in the manner prescribed by law, but shall be assessed in the manner prescribed by the State Board of Equalization. (Art. XIII, sec. 10.)

The law which prescribes the manner of assessment and the rules of evidence and notice must be made by the Legislature, and must be uniform in their operation. (Art. IV, sec. 25, sub. 10; Art. I, sec. 12.) The rules which this law prescribes must be determined. (Cooley on Constitutional Limitations, 4th ed., T. P. 110, S. P. 91.)

The law which prescribes the manner of the assessment of franchises, etc., of railroads operated in more than one county and the rules of evidence relating thereto must be made by the State board of equalization. They need not be uniform in their operation. A new rule can be adopted for each case. These rules need not be predetermined. It is at the pleasure of the board to require notice or not. (Argument of atty. gen. in S. F. & N. P. R. R. *vs.* State Board of Equalization, p. 11.)

The owners of railroad property operated in more than one county are denied any protection from the laws, which—

1. Require that property shall be taxed in *proportion* to its value.

2. Require such proportions to be ascertained by a general law.

3. Give an appeal from the assessor to another tribunal.

4. Require the assessment to be made in the county and prevent its being made in localities distant from the *situs* of the property.

5. Which prescribe the mode and manner of the assessment.

Each of which laws go to the very essence of the taxing power.

No Such Discriminations Have Ever Been Attempted in Any Other State.

It is true that in some States laws exist for the ascertainment of the value of railroad property by tribunals differently constituted from the tribunals which ascertain the values of other property, but such tribunals have jurisdiction over *all railroad* property. The manner of their proceeding is regulated by laws analogous to the laws governing other tribunals exercising like powers—by laws which throw around the owners of such property every protection which the laws give to the owners of other kinds of property.

The distinctions between the constitutional and statutory provisions of Illinois, discussed in State railroad tax cases (92 U. S. 75), and those above given are so marked that the cases there decided ought not to be considered as at all applicable to the questions arising in these cases.

In *ex parte* Denis Kearney (55 Cal., 21.) the supreme court of California quotes with approval the language of Campbell, J., in Jackson *vs.* The People (9 Mich., 111), that "the Constitution, in apportioning the judicial power, *as well as in affirming the immunity of life, liberty, and property, has always been understood to guarantee to each citizen the right to have his title to property and other legal privileges determined by the general tribunals of the State.*"

The masterly and comprehensive definition by Daniel Webster of the clause involved is, perhaps, the true one, and sustained with more unanimity by the authorities than any other: "By the *law of the land* is most clearly intended the *general* law—a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of *general rules* which govern society."

Cooley on Constitutional Limitations, 3d ed., p. 449.

"Every man is entitled to a certain remedy in the law for all wrongs against his person or his property, and cannot be compelled to buy justice or to submit *to conditions not imposed upon his fellows* as a means of obtaining it."

The terms *law of the land*, says Chief Justice Hemphill, in James *vs.* Reynolds (2 Texas, 251), "have often been construed and somewhat variously defined. They are now, in their most usual acceptation, regarded as general public laws, binding upon all the members of the community under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals."

Upon this topic Judge Cooley, after a review of the authorities, remarks: "As to the safeguard law of the land in tax proceedings, neither the practice of governments nor the decisions of courts warrant us in saying that it includes a judicial finding of delinquency before a sale can be made. *It means*, beyond any question, regular and orderly proceedings, under the *general law*, by the proper department of government, and means nothing more."

Cooley on Taxation, note 2, pp. 40 and 41.

This brings us to the consideration of what a general law is. Upon this topic I beg also to refer the Court to the brief of Judge Brown filed in this case.

In Potter's Dwarris the division of statutes noticed is that of general or public acts, and such as are special or private. The most comprehensive, if not the most precise, definition is that given by Dwarris: "That public acts relate to the public at large, and private acts concern the particular interest or benefit of certain individuals or particular classes of men."

Potter's Dwarris, 52.

"General laws are those which relate to or bind all within the jurisdiction of the law-making power, limited as that power may be, in its territorial operation or by constitutional restraint."

Sedgwick on Stat. and Const. Law, p. 30.

"The general description of public acts is that they relate to or concern the interests of the public at large, or relate to a general *genus* in relation to things, and private acts relate to private individuals, or an individual only, or which concern a particular *species* of such general *genus* or things."

Smith on C. Const., sec. 795, p. 913.

The rule "requires that any general law must be as broad as the subject-matter to which it relates."

Desmond *vs.* Dunn (McClure Charter), 55 Cal., 252.

"It may be true that it (the law) bears equally upon all to whom it is applicable, but this does not make it a general law, for if that was the test there could be no special laws."

McKinstry, J., in *ex parte* Westerfield, supreme court of California, August 20th, 1880

In Van Zandt *vs.* Waddell (2 Yerger, Tenn., 268) it is said "that a law which is partial in its operation, intending to affect particular individuals alone or to deprive them of the benefit of the general laws, is inhibited by the Constitution and is void." The learned Judge Catron, in the same case, remarks: "That a partial law, tending directly or indirectly to deprive a corporation or an individual of rights to property or to the equal benefits of the general and public laws of the land is unconstitutional and void, we do not doubt." And again: "The right to life, liberty, and property of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land in similar circumstances, and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies that lead to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule and the mass of the community who made the law by another."

The provision of the constitution of the State of California which we have been considering, and to which we object, is one which does provide, in effect, not that all corporate bodies, but that certain corporate bodies, shall be governed by one rule, while the mass of the community who made that constitution shall be governed by another."

Justice Catron, proceeding, says: "The idea of a people, through their representatives, making laws whereby are swept away the life, liberty, and property of *one* or of a *few* citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of Magna Charta in England, securing the subjects against odious exactions, which is, and for centuries has been, the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason of its adoption as part of our Constitution."

The provision of the Constitution to which we are objecting is, in effect, that the valuation of a portion of railroad property operated in more than one county shall be made by a State board of equalization, which may assemble at any time or place within the State; may act without evidence; and from the action of which, according to the theory of the State, there is no appeal. This makes a case within the very reason of the rule as it is expounded by Judge Catron.

Of all the members of that constitutional convention it is not to be presumed that there was a single one who would have been willing to be bound by such a rule applied to his own property, and of all the constituents of those members it may be said without extravagance that not one would have assented to his property being valued in such a manner and by such a tribunal. We have here, then, in the

shape of a constitutional provision a law under which might be swept away the property of all the corporations or persons affected, but by which neither the representatives of the people who framed the provision nor their constituents would be willing to be bound. We have such a provision made applicable to their property, which Justice Catron characterizes as "too odious to be tolerated in any government where freedom has a name."

Wally's Heirs *vs.* Kennedy (2 Yerg., 554), was an act of ejectment brought by the heirs of Wally against the defendant, claiming the land in controversy as a reservation, by virtue of the treaties of 1817 and 1819 with the Cherokees. The material question involved was this: On the trial below the defendant proved that the suit was prosecuted for the benefit of another, and not the lessors of the plaintiff, who had contracted to convey their interest before the suit was brought.

On this point the court charged the jury "that if they believed the lessors of the plaintiff had sold their interest in the land in dispute they must find a verdict for the defendant." The jury accordingly found a verdict for the defendant. The charge of the circuit court was grounded on the act of 1827 (ch. 39), passed December 6th of that year. A suit was commenced on the 27th of August, 1827. The act provides, among other things, that the defendant, on the trial of the cause, might prove by witnesses that the suit was instituted or prosecuted, in whole or in part, on a contingent interest, or in trust for any other person than the one in whose name the suit was brought, and if the fact should so prove on examination it would operate as a bar to the recovery of the plaintiff. Judge Catron delivered the opinion of the court, holding that this act was a partial law; that the treaty between the United States and the Cherokee Nation of Indians secured to the reservees the right of citizenship, and that, of course, in 1827 they held the same relation to the body politic and were entitled to the

same measure of constitutional protection as the citizens of Tennessee, and he inquires, "Does that part of the act of 1827 which declares that the suit shall be barred if the defendant prove it was prosecuted in trust for another violate the Constitution?" and, answering this inquiry, proceeds: "By this (the Constitution) it is declared that no free man shall be disseized of his freehold or deprived of his property, but by the judgment of his peers or the law of the land. What is the 'law of the land?' This Court, on two occasions, and upon the most mature consideration, has declared the clause 'law of the land' means a general, public law, equally binding upon every member of the community. The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void;" and here he quotes with approval from his own opinion in the case of Van Zandt *vs.* Waddell.

The objection to the act in Wally's Heirs *vs.* Kennedy was that it was limited in its operation to a comparatively small section of the State and to a very few individuals, claiming a very small portion of the section of the country referred to.

"The act," says the learned judge, "was intended to drive from the courts of justice a few odious individuals, who, it was supposed, had speculated upon the ignorance and necessities of the Indian reservees, and fraudulently obtained their claims for trifling considerations, and were corruptly obtaining evidence to establish rights to reserves where the Indians, in fact, never had any, to the prejudice of purchasers from the State. If the supposed facts did exist, there was good cause for public indignation, but none for a violation of the Constitution by the passage of a law affecting the rights of a few individuals, but by which the great

body of the people or the legislators themselves were unwilling to be bound. The part of the Constitution referred to was intended to secure to weak and unpopular minorities and individuals equal rights with the majority, who, from the nature of our Government, exercise the legislative power."

The court in Wally's heirs, as we have observed, held the act unconstitutional, because it was partial in its operation, applying to a comparatively small section of the State and to but few individuals therein.

In The State Bank *vs.* Cooper (2 Yerg., p. 599) an act of the Legislature of Tennessee of 1829 (ch. 95) directed a court to be holden at Nashville, to consist of a judge of the supreme court, a chancellor and a judge of the circuit court, with power and authority, upon complaint by the bank, to hear and determine all causes against the officers of the bank and their trustees and against persons who might be overchecked, and therefore become defaulters to said bank. It will be seen that the act of 1829 differs from the act considered in Wally's heirs in this respect. In the latter case the act referred to a small section of the State, while in the former it refers to a portion of the people or corporations of the State.

Green, a judge of the supreme court; Peck, a judge of the circuit court, and Judge Kennedy, the persons referred to in the act of 1825, and who were to hold the court directed by that act, in pursuance thereof, at the appointed time, met at Nashville, organized, and appointed their clerk. The bank, under the provisions of the act, commenced the suit against Cooper. The defendants plead that Jacob Peck, Nathan Green, and William E. Kennedy had no power or authority to hear, try, and determine said complaint, nor had they jurisdiction thereof. In support of this plea several constitutional grounds were taken, only one of which (the fifth) it is necessary here to take notice. That was that the law was partial in its operation, and for that reason was

not a law of the land. Each of the judges delivered an opinion, and all agree that the fifth point was well taken. An extract from the opinion of Judge Peck (p. 613) fairly presents the view taken by all of the judges: "Is the act on its face partial in its provisions and personal in its application, affording advantages to one side and withholding them from the other by such provisions as are found not to apply to other portions of the community besides those specified in the act? This is a delicate question. I am confident that the framers of the law did not intend that the act should be subject even to such a suspicion, but times do arise when men are hurried into measures which on cool deliberation, they might themselves condemn. Putting intentions aside, what are the provisions of this act? It provides that, touching a few individuals, the court should by summary process call them before the judges and fix, at pleasure, the time of their appearance; put interrogations to principals in bonds, hear testimony, adjudge and award execution against both them and their securities for breaches of trust, indebtedness, and malfeasance in office. All this the judges are empowered to do by this act without regard to form or substance. * * * The duty assigned to this court is aside from the duty belonging to its members as judges. The act relates to the few specially named in it. The rules by which we are to be governed are not those common to the rest of the community. The right of trial by jury is made discretionary, if not absolutely taken away, by the act, and the right of appeal is taken away in express terms. Under these circumstances, is the law of the land likely to be afforded to the defendants? When I am acting under the Constitution of my country and the equal distribution of rights becomes a question, I am not to forget that our ancestors knew, before the making of our Constitution, that when a Sidney was to be tried a Jeffries had to be selected. Weak and feeble as my walk may be in the station

I occupy, it shall be my endeavor to move with even-handed justice. The franchises of the State might become dangerous engines in the hands of the crafty if judges could be moulded to meet exigencies."

Now, it will be observed that the objection taken to the act involved in the State Bank *vs.* Cooper was, that touching a few individuals the court should by summary process call them before the judges. Our State constitution provides in effect that, touching a few individuals, their rights and interests shall be determined by judges who are not even required to call the persons interested before them. In the Tennessee case the court was required to be governed by the rules of law and equity. Under our constitution the State board of equalization may act independently of all rules, save those of its own making. In Tennessee the court was supreme in its own sphere of action, and from its judgment there could be no appeal; so it is said of our State board of equalization. In the Tennessee case the rules by which the court was to be governed were not those common to the rest of the community; so in this case. In the Tennessee case the right of trial by jury was discretionary; in this case there is no trial.

Considering the whole matter, and turning it as we may, the provisions of our State constitution which authorize the State board of equalization to fix the value of the property of a few corporations are more obnoxious to the Federal Constitution than were the provisions of the act of the State of Tennessee to a similar provision in the constitution of that State.

To the three cases cited from Yerger we earnestly call the special attention of this Court. They were decided by able judges, after mature deliberation and upon principles which are entirely applicable to the case at bar.

There were at the time of the adoption of the new constitution but a few corporations or persons operating rail-

roads in more than one county in the State of California. The circumstances attending the adoption of section 10 of article XIII of that constitution, being matters of common notoriety, are, therefore, supposed to be within the knowledge of the courts. These circumstances all indicate that it was the intention of the framers of that section to single out these few companies and persons and apply to them a rule which they would not have thought of applying to the community at large.

No express words that could have been used in the constitution could limit the operation of the section in question more absolutely and definitely to such companies than those employed. The obligation of the Federal Constitution cannot be so evaded.

Devine *vs.* Cook County, 84 Ills., 592.

The section in question may masquerade in the garb of a general rule, but the disguise is too transparent to deceive for a moment the eye of justice. Courts clothed with power to enforce the sanctions of the Constitution will not hesitate to penetrate the shadow of the words and seize and do judgment upon the substance.

POWER TO ALTER OR AMEND OR REPEAL.

It is claimed that the right to discriminate is found in the reserved power to alter, amend, or repeal the laws under which corporations are formed, and this brings us to the consideration of—

The Control of the State over Corporations Formed under a General Law where a Reserved Power of Amendment is Embodied in the Law or Imposed by the Constitution.

In the Dartmouth College case it was held that the charter constituted a contract between the sovereign and the corporation. The charter in question was a royal charter, and the rights under it rested in the grant. At and before the time the decision in that case was made the various State Legislatures of the Union had been creating corporations by special legislative acts. These acts constituted the charters of the corporations so created, and, like the royal grants, were properly construed as contracts between the State and the corporations. After the decision in that case was promulgated the various States, acting upon the hint given by Judge Story, began to insert in the charters thereafter granted a reservation of the right to alter or repeal. These reservations, being part of the contract, were held to take the contract out of the rule laid down by the court in the Dartmouth College case, and to permit one party to that contract, to wit, the State, to change its terms, notwithstanding the inhibition of the Federal Constitution against impairing the obligations of contracts. In the course of time it was felt that the power to create corporations by special acts which conferred upon the corporators special privileges not enjoyed by the community in general tended to evil results, and to prevent such results provisions began to find their way into State constitutions, which not only forbade the creation of private corporations by special acts, but which did in effect prohibit entirely the creation of private corporations by special acts, but which did in effect prohibit entirely the creation of private corporations by the Legislature. The provision in the California constitution of 1850 is a fair type of the provisions in question. It is article IV, section 31:

"Corporations may be formed under general laws, but shall not be created by special acts, except for municipal pur-

poses." Corporations are not to be created by legislative acts, but general laws must be passed under which persons may voluntarily associate themselves together. General laws do not sound in contract. General laws may, without any reservation, be altered or repealed at the will of the law-making power, and a reservation in a general law that it might be altered and repealed would and could have no significance whatever. No person, as we shall hereafter show, has a vested right in general laws, and therefore the repeal could never impair the obligation of contracts or invade the domain of governmental power reserved to the people or prohibited to the State. A general law authorizing persons to associate themselves for business purposes is simply a municipal regulation. The persons acting under its authority would have no more legal right to complain of its repeal than would a public officer exercising functions under a statute have the right to complain of the repeal of that statute. The reservation of the right to alter or amend would find an appropriate place in a royal grant of privileges; it would have an office to perform in a legislative charter, but has neither office to perform nor place in a general law. The reservation in the constitution of California, in the connection in which it is used, is but a blunder.

The effect of a repeal of a general law upon rights acquired under the law is familiar to all and the rules governing are elementary, so that even allusion to them here would be out of place. The right to alter, amend, or repeal a general law it not a novel one; it has universally been exercised from the foundation of the Government. No American law-giver ever claimed for his work the sanction of divinity or exacted from his countrymen a pledge that it should not be repealed. The power to repeal a general law is one thing, but the power to disturb vested rights is another and a very different thing. To disturb vested rights is a power denied by the constitution of every State in the Union as well as the Federal Constitution, and, moreover, as we shall hereafter

see, it is a power which can never be exercised until the great fundamental principles which underlie our form of government shall have been numbered among the things that have been.

To give to this reservation all the force claimed for it, it is, after all, but a reservation of legislative power. To reserve is to keep back, to withhold. As the Legislature never had the right to impair the obligation of contracts or to confiscate property it therefore could not, in the nature of things, reserve any such power. The law-making power, whether exercised by the people in their original capacity or by a legislative assembly to whom it has been delegated, does not rest in a contract between the law-making power and the person whom the legislation is to affect. The law-making power of the States of the Union is limited by the provisions of the Federal Constitution and by the fundamental principles of our Government, and neither a natural nor artificial person can confer upon the State or the people of the State the right to do a thing which either the Federal Constitution or the fundamental principles of Government forbid. It was held in the Mobile case (Pollard's Lessees *vs.* Hagan, 3 Howard, p. 223) that the sovereign State of Alabama could not by treaty with the Federal Government enlarge the powers of that Government even as to the State of Alabama itself, and the principle of that case has still more telling force when an attempt is made to maintain the doctrine that a citizen of the State, by a contract with the Legislature, can barter away his inalienable rights and by contract confer upon the Legislature of a State an authority the exercise of which is prohibited to that Legislature by the Constitution. Can I lawfully agree with the Legislature of this State that if it grants to me an acre of submerged land I will surrender my right to trial by jury? No one would dare to answer this question in the affirmative. I cannot give to a private individual the right to take my life nor exempt him from the penalty which the law denounces against him if,

at my own request, he deliberately takes my life. I may lawfully surrender property which I own, may give it away, but I cannot surrender the right to acquire, possess, and enjoy property. This right exists for the benefit of society, and the exigencies of society require that it should be sacred.

The examination which we have already made of the nature of these so-called corporations shows conclusively that the only right which they acquire from the State under the general law is the right to be a corporation. It would seem to be self-evident that the only thing which the State could take away would be the right which it had conferred, and as that right in this class of corporations is conferred by general law in which no one has a vested right the corporation could not be heard to complain. The man who to-day erects buildings and puts in them machinery for the manufacture of some article of common consumption on the importation of which the law imposes a tariff duty which is practically prohibitory may expect that this will continue in force, and that he will in consequence reap large profits, but he has no vested right in the general law which imposes the tariff, no vested right which could entitle him to insist that the law shall remain unchanged for his benefit. If the duty should be removed and his property rendered worthless in consequence he is nevertheless deprived of no right. "All statutory privileges," says Mr. Cooley, "depend upon this principle, and they may be taken away by changes in the general laws at any time." (Principles of Constitutional Law, p. 320.)

So the persons who formed the corporation party to this suit may have been impelled to do so by reason of the general laws of the State of California. They have no vested right in those general laws, and the Legislature may at any time take the life of the legal entities which hold the legal title to the property of which they are the beneficial owners. The Legislature may kill the trustee, but the rights of the

beneficiary to the property will remain intact. The right of the beneficiary to it will be as complete as though there had never been a corporation in existence.

JUDICIAL CONSTRUCTION OF THE POWER TO ALTER, AMEND, OR REPEAL.

All authorities agree that this power is not unlimited; that sheer oppression and wrong cannot be inflicted under the guise of an amendment or alteration.

Shields *vs.* Ohio, 95 U. S., 324.
Sinking Fund Cases, 99 U. S., 721.
New Jersey *vs.* Yard, 95 U. S., 104.
Miller *vs.* New York and Erie Railroad Company, 21 Barber, 518.

In Peik *vs.* Chicago Railway Company (94 U. S. 175) the question of the power of the Legislature of Wisconsin to provide by law for the maximum charge to be made by the Chicago and Northwestern railway for fare and freight upon the transportation of persons and property carried within the State was presented. In the course of his opinion in that case Chief Justice Waite observes:

"The company was chartered under a special act of the Legislature. The constitution of the State in force when the act of incorporation was passed provided that all acts for the creation of corporations within the State may be altered or repealed by the Legislature at any time after their passage."

The learned Chief Justice continues:

"It was conceded upon the argument that this reserved power of the constitution gave the Legislature the same power over the business and property of corporations that it has over individuals;" or, as it is expressed by one of the counsel: "Nothing more could have been intended than to leave the stockholders in corporations in such a position that the Legislature could place them on the same footing with

natural persons before the law and disable them from permanently evading the burdens on all others engaged in similar vocations by appealing to the letter of their charter. Their object was not to open the doors to oppression, but to secure simple equality between citizens of the State, whether working singly or in corporate associations." "Without stopping to inquire," continues the learned Chief Justice, "whether this is the extent of the operation of this important constitutional reservation, it is sufficient to say that it does, without doubt, have that effect."

In Chicago, Burlington and Quincy Railroad Company *vs.* Iowa (94 U. S., 155), the Chief Justice, in delivering the opinion, expressed substantially the views of counsel in the Peik case, and said, speaking of the same railway company:

"This company in the transaction of its business has the same rights and is subject to the same control as private individuals under the same circumstances."

Partnerships in the State of California are formed and exist under general laws, which regulate the rights and liabilities of the parties, the manner and mode of conducting the business of the partnership. These laws are found in the civil code of California. The right to alter, amend, or repeal them is as undoubted as though it had been expressly reserved in the constitution or the laws themselves. The next Legislature which assembles may repeal every law in relation to partnerships, and may, unless there is a right of association coming from a source higher than the constitution, prohibit the formation of partnerships, the use of firm names, or the transaction of business by associations of men. While it may be conceded that the Legislature can do all of these things, yet no one would claim that they could take from the partners the property which they had already acquired. If the right to take the property of the persons composing the so-called corporations of California lurks in the reservation to alter, amend,

or repeal the corporation laws, the same right to destroy partnerships and to confiscate the property of the partners may be found in the acknowledged right to alter, amend, or repeal the municipal regulations relating to partnerships.

Mr. Justice Story, in the case of Allen *vs.* McKeen (1 Sumner, p. 176), held that under a reservation "to alter, restrain, or extend" the State could not "meddle with the property of the corporation or extinguish its corporate existence."

In Sage *vs.* Dillard (15 B. Monroe, p. 340) the supreme court of Kentucky held "that the Legislature might, by virtue of a reservation in a statute similar to the reservation in the constitution of the State of California, repeal or destroy, but that the power merely to repeal or destroy did not imply right to cripple or to maim."

In Miller *vs.* The New York and Erie Railroad Co. (21 Barb., p. 513) it was held that the power to alter, modify, or repeal charters did not authorize a Legislature to compel a railroad company to cause a new highway to be taken across their line at their own cost, there being no provision touching new highways in their charter. It was further held in the same case that a law imposing such a new obligation on the railroad, passed subsequent to its incorporation, was the taking of private property without compensation.

In the Commonwealth *vs.* Essex Co. (13 Gray, p. 239) Mr. Chief Justice Shaw, delivering the opinion, suggested the following as a rule of limitation of legislative power to amend or alter:

"That where, under power in a charter, rights have been acquired and become vested no amendment or alteration of the charter can take away the property or rights which have become vested under the legitimate exercise of the powers granted."

In Durfee *vs.* Old Colony and Fall River R. R. Co. (5 Allen, p. 230) the Court refrained from the expression of any opinion on the limits of legislative power to alter or amend, but

the case was fully argued upon this proposition, and the limitation of the exercise of this power was thus broadly and tersely laid down by counsel.

"The limit to this power will be found when any attempt is made to abrogate any contract made by the corporation under their charter or deprive them of any vested property or rights of property legally acquired."

Chief Justice Bigelow, who delivered the opinion of the Court in Durfee *vs.* Old Colony and Fall River R. R. Co., at its conclusion, observes (5 Allen, p. 247):

"It may be well to add, in order to avoid misapprehension, that we do not intend to say that the Legislature have any power to change or modify an act of incorporation in such a way as to affect in a material particular a contract which they have entered into with a third person. Such an exercise of legislative power would be unconstitutional and invalid, because it would impair the obligation of a contract."

The Massachusetts cases cited are the most instructive cases to which my attention has been called. The high legal standing of the judges who participated in those decisions and the appreciation in which the supreme judicial court of Massachusetts is universally held give controlling force to those authorities.

In Territt *vs.* Taylor (9 Cranch, 43) Mr. Justice Story, who, delivering the judgment of the Court, held that the church property in Virginia was not public property, but the property of the several parishes, and did not become the property of the State by the Revolution and the disestablishment of the church. Upon this topic he says:

"Had the property thus acquired been originally granted by the State or the king there might have been some color (and it would have been but a color) for such an extraordinary pretension, but the property was in fact and in law generally purchased by the parishioners or acquired by the benefactions of pious donors; the title thereto was indefeas-

ibly vested in the churches, or rather in their legal agents. It was not in the power of the crown to seize or assume it, nor of Parliament itself to destroy the grants, unless by the exercise of a power the most arbitrary, oppressive, and unjust, and endured only because it could not be resisted."

The learned editor of the American Law Reporter (vol. 1, No. 3, April, 1867) collates the authorities bearing upon the legislative control over corporations under reservations in special charters, and after an elaborate, but, as to the corporations, an unfriendly, review of the same, stated his conclusions substantially as follows :

"From the multitude of decisions which have now been reviewed certain principles can be deduced as fully incorporated into the body of settled American law: 1. Where an absolute power to alter, amend, or repeal acts of incorporation have been reserved to the Legislature the power of repeal is unqualified. 2. It is immaterial whether the reserved power was specially set forth in the particular charter of the corporation, or was at the time the grant was made part of the general statute law of the State. 3. That all reservations in grants to corporations are to be construed in favor of the State. 4. That the Legislature is the sole judge within certain limits of the justice or propriety of alterations and amendments to charters. 5. The Legislature can make no alteration or amendment to any charter, under its reserved power therefor, which shall impair the obligation of any contract legally entered into by the corporation; and, 6, neither can the Legislature make any alteration or amendment by which a corporation is deprived without compensation of its own vested property or rights."

The foregoing is a statement of principles to be deduced from the decisions upon the subject in hand was made by one who was endeavoring to give to the reservation in question the most liberal construction. It may be said here, in answer to the fears which have been expressed that the vast properties in the ownership of transportation companies might be used to endanger the safety of the people, that if

the time ever comes when it shall appear that these fears are well founded, and that it is right and proper for the Government to assume control of these properties, ample Government power to that end exists in the power to take private property to subserve the public uses. Under the exercise of this power the whole of this property could be transferred from the individual to the Government, and the safety of the Government on the one hand be assured, while the interests of the individual, on the other, would be fully protected by the compensation which the Government would make.

Another View of the Reservation to Alter, Amend, and Repeal Found in the State Constitution of California.

The provisions of the constitution of California of 1850 (art. IV, sec. 31) are that corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed. It will be observed that these provisions differ materially in their effect from provisions of like character in a special charter. Under the constitution of 1850 a private corporation cannot be created; it must be formed under general laws, and the reservation is not that the act by which a special corporation is formed may be altered, amended, or repealed, but that the general laws under which the corporation is formed may be altered from time to time or repealed.

Section 31, article IV, of the old constitution is found in that portion of the instrument which limits the legislative power; and if it be true, as contended on the other side, that a general law under which a corporation is formed constitutes the charter of that corporation and rests in contract, it must also be true that the constitutional provision in question becomes part of the contract between the corporation

and the State—the corporation, on the one hand, agreeing that the privileges conferred may be modified or taken away, and the State, on the other, agreeing that such modification shall only be made for such privileges taken away by general law; and it must be further held, in this view of the case, that the "Bill of Rights" enters into and becomes a part of that contract, and that all general laws passed must be in subordination to the provision of that "Bill of Rights." The Central Pacific railroad, as it appears from the pleadings, was formed under the railroad act of 1861. The term of its existence was fixed for the period of fifty years. It is, therefore, one of the corporations entitled to protection against special legislation, whether that legislation be in the shape of a statutory enactment or a constitutional ordinance. A change of the constitution cannot release the State from contracts made under a constitution which permitted them to be made. The inquiry is, Was the contract permitted by the then existing constitution? If so, the sovereignty which ratified it is the same sovereignty which made the constitution of 1879, neither having more power than the other to impair a contract made with persons by the State Legislature. (Dodge *vs.* Wolsey, 18 Howard, 360.)

The Limitation of the Power to Alter, Amend, or Repeal Has Been Defined by the Supreme Court of the State of California.

The reservation which we have been discussing applies to legislation creating municipal as well as private corporations. It never has been doubted that the control of the State over the affairs of municipal corporations is more absolute than its control over the affairs of private corporations. It has been maintained in some quarters that the State has the right to create and enforce an obligation against a municipal corporation of its own creation; that it has the right to appropriate the money and property of such a corporation, but in California it has been expressly held that this

power, even as to a municipal corporation, does not exist, and that the Legislature cannot, without the consent of a municipal corporation, create and enforce a claim against it. (Hoagland *vs.* The City of Sacramento, 52 Cal., 151.)

It has been further held in that State that the Legislature cannot levy a tax or assessment for a municipal purpose without the consent of the municipality (People *vs.* Lynch, 51 Cal., 15). The California cases cited settle the question in controversy here, for they clearly hold that the property, even of a municipal corporation, cannot be taken, except by due process of law, notwithstanding the reserved power in question.

Mr. Justice Story, in the Dartmouth College case, considering this topic, says:

"It may also be admitted that corporations for mere public government, such as towns, cities, and counties, may, in many respects, be subject to legislative control, but it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendent that it may, at its will, take away the private property of the corporation or change the uses of its private funds acquired under the public faith."

May it please the Court, I now come to what I think is a decisive question and beyond which you need not go, and that is that the assessment made by the State board of equalization and the tax claimed includes an assessment upon and a tax upon the operations of the defendant, and upon all the franchises and corporate powers held and exercised by the defendant, as well as upon its right to exist and operate, and that this assessment and tax is blended with the assessment and tax upon its property, so that the legal, if any, cannot be distinguished from the illegal; and the questions raised upon this are—

THAT THE CENTRAL PACIFIC RAILROAD COMPANY IS ONE OF THE MEANS AND INSTRUMENTALITIES SELECTED AND EMPLOYED

BY CONGRESS TO CARRY INTO OPERATION THE POWERS GRANTED TO THE GENERAL GOVERNMENT. A TAX UPON ITS FRANCHISE, UPON ITS RIGHT TO EXIST AND OPERATE, IS, WITHIN THE MEANING OF ALL THE AUTHORITIES, A TAX UPON THE MEANS AND INSTRUMENTALITIES OF THE GENERAL GOVERNMENT. WITHOUT THE EXPRESS CONSENT OF CONGRESS NO STATE CAN IMPOSE SUCH A TAX; ALSO THAT THE TAX IMPOSED UPON THE RIGHT TO EXIST AND OPERATE IS A TAX UPON BUSINESS. PART OF THE BUSINESS OF THE DEFENDANT BEING INTERSTATE, THEREFORE THE TAX IS VOID UNDER THE COMMERCE CLAUSE OF THE NATIONAL CONSTITUTION; ALSO THAT THE STATE BOARD OF EQUALIZATION HAD NO AUTHORITY, EVEN UNDER STATE LAWS, TO IMPOSE A TAX UPON BUSINESS.

Before proceeding to elaborate this point I desire once more to call the attention of the Court to the fact that this is an action at law; that before the plaintiff can recover the plaintiff must prove an assessment made by the State board of equalization in the manner prescribed by law upon property over which that board has jurisdiction and which belonged to the defendant.

We met the averments of the complaint by a denial of all the facts therein stated and by a denial of all the facts which the plaintiff would have to establish to recover, thereby putting the plaintiff upon full proof. Under these denials we were entitled to prove anything which went to the illegality of that assessment—which would show that it was not made in the manner prescribed by law and that it was not made upon property or rights over which the board had jurisdiction or upon property which did not belong to us. In other words, we were entitled to show anything which would defeat the plaintiff's case.

However, we did not rest upon this, but in a separate answer made the necessary averments to raise the point now

to be considered. In this case, folio 48, the averment of the answer is as follows:

"Said pretended assessment made by the State board of equalization is upon all of the franchises of the defendant, and the said board, in valuing the same, included the value of all the franchises and corporate powers held and exercised by defendant under said acts of Congress."

This averment was unnecessary, because it was simply meeting the case which the plaintiff was bound to make. The findings respond fully. Finding 30, folio 120, is that—

"Said pretended assessment made by the State board of equalization and the tax claimed is upon all of the franchises, the existence, and operation of defendant and upon all the franchises and corporate powers held and exercised by defendant, as well as its right to exist and operate."

In McCullough *vs.* Maryland (4 Wheaton, 400) the tax was upon the operation of the instrument employed by the Government to carry its powers into execution. In Osborn *vs.* The United States Bank (9 Wheaton, 738) the tax was upon the right of a branch bank to do business in the State of Ohio, and it was there held that there was no distinction between a tax upon the right of the instrument to exist and a tax on the operations or business of the instrument.

We maintain that the tax in question is void for several reasons:

First. Because it is a tax upon all of the franchises and corporate powers held and exercised by the defendant. These franchises and corporate powers are held and exercised in the State of California, in the State of Nevada, and in the Territory of Utah, and the State board of equalization of California had no jurisdiction to assess in proportion to their value the franchises and corporate powers exercised by the corporation in the State of Nevada and Territory of Utah.

Second. The assessment was upon the right of the corporation to exist and operate—that is, to do business—and the State board had no jurisdiction to assess or value the right of the company to do business even in the State of California.

Third. That the franchise and the right of the corporation to exist, so far as that franchise and right were derived from the Government of the United States, are not the subject of State taxation, and to that extent the corporation is but a means and instrument of the National Government.

Fourth. That the right to operate is derived in part from the National Government is exercised for the benefit of that Government, and that this right cannot be the subject of State taxation.

Fifth. That the operations of the corporation are, in the main, protected from State interference by the commerce clause of the National Constitution; that to carry on interstate commerce was one of the purposes for which Congress established the road and conferred many of its rights and franchises, and that a tax upon the corporation, so far as it is engaged in the transaction of interstate business, is a tax upon interstate commerce and is prohibited by the National Constitution.

It would seem that a statement of the first objection is all that is necessary. No one has here contended, nor could they do so, that the State has a right to tax all the corporate franchise and rights of this company. The corporate franchise and rights exercised in the State of Nevada and Territory of Utah were not conferred upon this corporation by the State of California, if any corporate franchise and rights were so conferred. We may concede for the purposes of this argument that the State of California could tax corporate rights and franchises, if any, which this corporation

derived from that State, but no attempt here has been made to separate these rights and franchises. The findings do not contain a copy of the assessment roll; on the contrary, the findings show that the State board of equalization assessed all of the corporate rights and franchises held by this company without regard to the source from which they came or within what territory they were exercised.

As to the second proposition. It is very clear that the only power conferred upon the State board of equalization is to value the property named in section 10 and over which it has jurisdiction as property. It would be very clear that in the absence of the word "franchise" in that section the State board of equalization would have no power to value the business as distinguised from the property of any person or corporation, and the only question which can arise under this point is whether the power to value the franchise confers upon the State board of equalization power to assess and value the business carried on by the corporation holding the franchise.

The word "franchise" as used in the constitution in relation to assessments is always used in connection with provisions relating to an ad valorem tax upon property, and in all other assessments than those made by the State board it has already been seen that the law requires the value of the franchise to be placed on the property assessment roll separate from anything else. (Political code, section 3650, subdivision 15.) The tax is a property tax upon the actual cash value of the franchise, and when the State board of equalization has assessed that franchise at its actual cash value its power ceases.

I challenge the gentlemen upon the other side to point to any law in the State of California which authorizes the State board of equalization to assess and tax the right of any person to do business in that State.

This Court, in the Illinois tax case, has considered this subject, and in that case it never for a moment considered

that the right to levy an ad valorem tax upon the franchise of a corporation included the right to assess and levy a tax upon the business of the corporation. Ad valorem taxes upon property are one thing; taxes upon business, occupation, trades, and professions are another and an entirely distinct thing. Article 13 of the State constitution provides for an ad valorem property tax laid in proportion to the value of the property, and does not deal with taxes upon business, trades, or occupations, except in so far as in section 11 it authorizes the Legislature to impose income taxes.

The third and fourth objections will be considered together.

THE NATIONAL GOVERNMENT HAVING DECREED THAT THIS CORPORATION SHALL LIVE, NO STATE CAN VISIT UPON IT THE PENALTY OF DEATH.

The Acts of Congress.

On the first of July, 1862, Congress, in the exercise of powers that are not now questioned, passed "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean and to secure to the Government the use of the same for postal, military, and other purposes." (12 U. S. Stat., 489.)

The first section of the act names a number of persons, and declares that they, "together with five commissioners, to be appointed by the Secretary of the Interior, and all persons who shall or may be associated with them and their successors, are hereby created and erected into a body corporate and politic, in deed and in law by the name, style, and title of the 'Union Pacific Railroad Company.'" The company thus created is vested with the usual and customary powers of a corporation. The corporation is then expressly authorized to construct and maintain a railroad and telegraph line upon a given line and between certain points

named. The amount of the capital stock is next prescribed, and also certain rules and regulations for the government of the corporation, the management of its affairs, and the transaction of its business. Provision is also made for the election of a board of directors and for the appointment of two additional directors by the President of the United States, to act as directors on the part of the Government. The second section grants a right of way through the public lands, with the further right to take from the public lands adjacent to the line of the road materials of every description for the construction of the road, concluding with a promise on the part of the United States that the Indian titles to all lands falling under the operation of the act shall be extinguished as rapidly as may be. The third section grants to the company alternate sections of land on each side of said road, with certain reservations as to mineral lands and lands reserved or otherwise disposed of or to which pre-emption or homestead claims have attached. The fourth section provides, among other things, for the appointment of three commissioners by the President, who are to examine the road from time to time and report to him as to the manner of its construction and the progress made therein with a view to the issuing of patents for said lands, and that all vacancies occurring in said board of commissioners shall be filled by the President. The fifth section provides for the loaning of the credit of the Government in the shape of bonds and securing the payment thereof by a first lien upon the road and telegraph, together with all the rolling-stock and other property, and concludes with a provision which has a most important bearing upon the question in hand, viz:

"And on the refusal or failure of said company to redeem said bonds or any part of them when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging,

and also all lands granted to the said company by the United States which at the time of said default shall remain in the ownership of the said company, *may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States.*"

This provision is followed by another, contained in the sixth section, which provides—

"That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid."

Power to consolidate with other companies named in the act is given in the sixteenth section. The right to connect with the road is given to other companies by the fifteenth section. The President is authorized to establish a uniform width of track, so that the same cars can be run from the Missouri river to the Pacific Ocean, by the twelfth section. The seventeenth section provides that if said company shall fail to comply with the terms and conditions of the act or to keep the road in repair and use for an unreasonable time, "Congress may pass any act to insure the speedy completion of said roads and branches or put the same in repair and use, and *may direct the income* of said road and telegraph line to be thereafter devoted *to the use of the United States*," *etc.;* and, further, that if said roads are not completed "*so as to form a continuous line from the Missouri river to the navigable waters of the Sacramento river* by the first day of July, 1876, said road with all their rolling-stock, fixtures, etc., *shall be forfeited to and be taken possession of by the United States.*" The eighteenth section provides that when the net

earnings of the road and telegraph shall have reached a certain per centum upon their cost—

"Congress may *reduce the rates of fare thereon*, if reasonable in amount, and *may fix and establish the same by law*, * * * and may at any time, *having due regard for the rights of said companies* named herein, *add to, alter, amend, or repeal* this act."

Finally, by the last section, the company is required to make annual reports, as to certain matters therein mentioned, to the Secretary of the Treasury, for the obvious purpose of enabling the General Government to supervise and control the road and telegraph by legislation and otherwise (12 U. S. Statutes at Large, 489).

The Union Pacific Railroad Company a National Corporation.

It is clear that the Union Pacific Railroad Company is a national corporation, created for the benefit and use of the General Government in the conduct and management of its postal, military, and other affairs, and it has been so decided (U. P. R. R. Co. *vs.* Meyers, 115 U. S.). The Central Pacific Railroad Company bears substantially the same relation to the National Government. The relation of the Central Pacific to the General Government differs from that of the Union Pacific in one respect only. The Central Pacific was not, in the first instance, a corporation created by the General Government. It was a corporation under the laws of the State of California prior to the passage of the Pacific Railroad act; its powers were confined to that State.

By the act of 1862 Congress conferred upon the Central Pacific the same powers which it conferred upon the Union Pacific, annexing thereto the same conditions. In the ninth section of the act it is provided that—

"The Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California,

are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first-mentioned railroad and telegraph line on the eastern boundary of California."

Again, in the tenth section, it is further provided:

"And the Central Pacific Railroad Company of California, after completing its road across the State, is authorized to continue the construction of said railroad and telegraph through the Territories of the United States to the Missouri river, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect and the whole of said railroad and branches and telegraph is completed."

In section 16 of the act of Congress of July 2, 1864, it was provided that upon complying with certain conditions (all of which have been complied with) the Central Pacific Railroad Company "shall enjoy all the rights, privileges, and benefits conferred by this act upon the Union Pacific Railroad Company."

Pacific Railroad Acts Compared with the Act Establishing the Bank of the United States.

In respect to this question of taxation, and in respect to the Union Pacific Railroad Company, the act of Congress in question is upon all fours with the act by which the Bank of the United States was established (3 U. S. St. at Large, 266). The plan adopted by Congress for the purpose of establishing the bank and securing its use to the Government as a financial agent is so similar to that adopted in the present case as to suggest that the former served as a model for

the latter, as in this instance a corporation with full banking powers was created. The amount of its capital stock was fixed at thirty-five millions of dollars, of which sum the Government was to subscribe only one-fifth, or seven millions, leaving twenty-eight millions to be taken by private individuals. The affairs of the bank were to be managed by twenty-five directors, of whom twenty were to be elected by the stockholders and five to be appointed by the President of the United States, by and with the advice and consent of the Senate. The powers of the directors and the business operations of the institution were defined and restricted. Power was given, with certain restrictions, to establish branch institutions in the several States. The Secretary of the Treasury was authorized to call upon the bank for a statement of its affairs as often as once a week. For the privileges and benefits conferred by the charter the president and directors of the bank were required to pay to the United States a bonus of one million and five hundred thousand dollars, in three equal payments; and it was lastly provided that the books of the corporation should always be open to the inspection of a committee of either House of Congress appointed for that purpose.

Contrast these provisions with those of the railroad act to which reference has been made and it will appear that the interest of the Government in the bank was much less, and the powers over its management and affairs assumed by the Government was much less sovereign than in the case of the railroad. The interest of the Government in the bank was but five millions of dollars; to the Pacific railroad and telegraph it has loaned sixty-three millions in bonds, and has made extensive grants of lands. As the Government shared in the management of the bank, through directors appointed by the President, so does it share in the management of the Union Pacific through the same means. As the Government was authorized to watch the operations of the bank, through committees of Congress and reports

by the directors of the bank to the Secretary of the Treasury, so has it watched the construction of the railroad and telegraph, through commissioners appointed by the President, and so has it, and does it, inspect the management and affairs of the Pacific railroad and telegraph, through annual reports made by the directors for a time to the Secretary of the Treasury, but latterly to the Secretary of the Interior. As the Government reserved the power to control the loans and business operations of the bank by legislation, so has it reserved the right to fix and establish by law *fares and freights* upon the Pacific railroad. The authority asserted over the bank was, therefore, in no respect greater than that asserted over the railroad; on the contrary, the authority asserted over the railroad is far greater in a most important particular. Nowhere in the act by which the bank was established was any provision made for the forfeiture of its franchises or for taking possession of its property by the Government and administering its affairs through other agencies, or in devotion of its income and resources to the use of the United States; yet the power to do all of these acts, which lies at the extreme verge of governmental power, has been reserved by the Government in the case of the Pacific railroad and telegraph.

Reference to the History of the Times.

"In construing an act of Congress we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it."

U. S. *vs.* The Union Pacific Railroad Company, 91 U. S., 79.

The act of Congress under which the first transcontinental road was constructed declares that it was passed to secure to the Government the use of the road for postal, military, and other purposes. The history of the times when it was passed cannot be recalled without impressing upon our minds the fact that the road in question was to be for national purposes of the highest kind. The population of the United States at that time was a little more than thirty-one millions and was confined chiefly to the States lying east of the Mississippi river, the great States of Minnesota, Iowa, Missouri, and Arkansas, lying west of the Mississippi river, then having populations small in comparison with the present population of either, and the settlements in those States were, by the very necessities of the situation, confined to territory lying within a few miles of navigable streams. West of the Missouri river, south of British Columbia, north of the Rio Grande, and east of the Sierra Nevada range was a territory almost, if not quite, equal in extent to that east of the Mississippi river. It was fourteen hundred miles in width and thirteen hundred miles in length—greater in extent and richer in natural resources than all the territory which Cæsar's legions gave to the dominion of Rome. Excepting the Mormon colony at Salt Lake, it was without a white settlement of any size from the Missouri to the Sierras. It was a solitude the silence of which was unbroken save by the trapper, the wild animals, and the wilder savage tribes, its only occupants. Much of it as late as 1850 was marked upon the maps as the "American Sahara, or the great unexplored desert." In the length and breadth of this territory there were but few navigable streams, and its occupation by civilized man, as it then stood, was an impossibility. The condition, even near the banks of the Missouri river, is graphically described by the chief engineer of the Union Pacific in his report to the president of that company, dated December 1, 1869. He says:

"In 1863 and in 1864 surveys were inaugurated, but in 1866 the country was systematically occupied, and day and night, summer and winter, the explorations were pushed forward through dangers and hardships that very few at this date appreciate, as every mile had to be run within range of the musket. There was not a moment's security. In making the surveys numbers of our men—some of the ablest and most promising—were killed, and during the construction our stock was run off by hundreds, I might add by the thousands."

The situation in the same respect was not less dangerous between the Sierras and Ogden; the country was infested with Indian tribes hostile to and nearly constantly at war with the whites.

West of the Sierras and bordering upon the Pacific lay the States of California and Oregon, exposed to attack in case of a foreign war. The people of California had from the very beginning demanded at the hands of the Federal Government the construction of a transcontinental road. Resolution after resolution had been passed by the Legislature of California, and, at last, to such length did it go that a convention was called to insist upon some action upon the part of the National Government. Muttered threats were heard that if the Government failed to perform what California believed to be an obligation that a Pacific Republic would be the consequence. The National Conventions of both the Democratic and Republican parties declared that the construction of a road across the Continent by which the States should be bound together by bonds of steel was a military necessity, and that such road should be built at once; but nothing practical was done by Congress until the country was involved in a civil war. Then California became a doubtful State, and for a long time it was questionable whether her destinies would be cast with the North or with the South. The importance of this State to the Union could not be overestimated. She possessed one of the finest ports

upon the Pacific coast. In the hands of the Confederate Government it would have been invaluable. Her shipments of gold diverted to the Confederate treasury would have drained that of the Union and enriched that of the Confederacy. As a military necessity, and to secure to the Government the use of a railroad and telegraph line from the Missouri river to the Pacific Ocean for postal, military, and other purposes, Congress, on the 1st day of July, 1862, passed the act chartering the Union Pacific and making offers of aid to the Central Pacific of California, then in existence and operation as a corporation. The aids granted by this act have been referred to. Under this act the Central Pacific began the prosecution of its work, but the Union Pacific was unable to do anything. On the 2d of July, 1864, Congress passed the second act, amending in many respects the act of 1862, increasing the land subsidy and subordinating the Government lien to the mortgages which it authorized the various roads to issue. Some of the reasons for the passage of this amendatory act of July 2, 1864, are given by the Supreme Court of the United States in the case of the United States *vs.* The Union Pacific Railroad Company (91 U. S., 80), and these reasons are so pertinent to the argument in hand that I cannot refrain from quoting:

"Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed. The war of the rebellion was in progress, and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but, even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true the threatened danger was happily averted; but wisdom pointed

out the necessity of making suitable provisions for the future. This could be done in no better way than by the construction of a railroad across the Continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States it was felt that the Government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion that it is by no means certain that the people would not have justified Congress if it departed from the then settled policy of the country regarding works of internal improvement, and charged the Government itself with the direct execution of the enterprise.

"This enterprise was viewed as a national undertaking for national purposes, and the public mind was directed to the end in view, rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails and of supplies for the army and the Indians.

"It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great and by many intelligent persons considered insurmountable."

There were other grave and potent reasons which caused the Congress of the United States to promote the immediate construction of a transcontinental road. While the act of 1864 was under discussion Johnston with a powerful army confronted Sherman; Lee held Grant in check at Peters-

burg; Early was advancing upon the National Capital. He took Harper's Ferry two days after the approval of the act, and before its approval was announced in the body in which it had originated Early's troops were in sight of the National Capital. The unhappy Austrian was upon the throne of Mexico. Bazaine with French troops occupied the country. Napoleon III was seeking an alliance with England in order to interfere on behalf of the Confederacy. Complications of a serious character existed with England, and that alliance was likely to be consummated. It would have been followed to a certainty by a blockade of the Pacific coast if not by a capture and occupation of Oregon and California. Nearly the whole power of the National Government was exhausted; its finances were crippled, and so clouded was its political horizon that one of the political parties on the 19th of August, 1864, in its platform declared that the war was a failure, and that peace should be made at almost any sacrifice.

It was in view of all these reasons that Congress passed the act of 1864 which set in motion the Union Pacific Railroad Company, and which in the end secured to this people and to the Government a transcontinental line. It is in the light of these historical facts that the Bourt will consider the question now presented.

The Exemption Claimed.

It has been claimed on behalf of the Central Pacific Railroad Company, and with great plausibility, that by reason of these acts the General Government has converted it into a national corporation, and that in form as well as substance it bears the same relation to the Federal Government and to the States as does the Union Pacific Company. It is also claimed that the State of California has assented to the adoption; that Congress had intended to and supposed it had erected the Central Pacific Railroad Company into a

national corporation is evident. Section 17 of the act of 1862 provides in direct terms for a forfeiture to the United States, for a non-performance of conditions, of the property and franchises of that corporation. "Conditions can only be reserved to the feoffer, donor or lessor, and their heirs, but not to a stranger." It would not be competent for Congress to provide for the forfeiture of the franchises of a State corporation to the National Government for non-performance of conditions, or to provide for the entry of the United States for such conditions broken. for "he who enters for conditions broken shall be in of the same estate he was before."

Wiseman *vs.* McNulty, 25 Cal., 239.

But whether it be true or not that the Central Pacific Railroad Company has in form been made a Federal corporation I shall not at this point stop to inquire. The question whether it is or is not a Federal corporation is of minor importance. Corporation or no corporation is not a factor in the solution of the problem.

The Central Pacific Railroad Company is an Instrument of the General Government.

By the unquestioned act of Congress the Central Pacific Railroad Company was selected as a means and instrument of the General Government to carry into execution the admitted powers of that Government. It was authorized to construct and operate a railroad and telegraph line upon the same "terms and conditions in all respects" as the Union Pacific.

These "terms and conditions" constitute the tests whether or not it has been made an instrument of the General Government. Congress has declared the reason and purpose in the title of the act to be to "secure to the Government the use" of a railroad from the Missouri river to the Pacific Ocean "for postal, military, and other purposes." To effect-

uate that purpose Congress created a corporation known as the Union Pacific Railroad Company and adopted the Central Pacific Railroad Company, and to these corporations, upon the same terms and conditions, intrusted the execution of its purposes. The two companies were charged by Congress with the speedy construction of the road and telegraph line. It was made their duty, when completed, to keep the same in repair and use, so that upon demand of the Government they could transmit its dispatches over the telegraph line and transport its mails, troops, munitions of war, supplies, and public stores upon the railroad. To the end that these companies might be in condition to perform these great governmental functions aids in lands were given and bonds were loaned. That the Pacific railroad companies might maintain and operate the vast machine intrusted to their care and be ready at all times to give to the Government its aid in peace and in war without too great a charge upon the public treasury they were authorized to transact business for private parties, but were required at all times to subordinate such business to the public duties cast upon them. The Government " must at all times have the preference." At all times both companies are subject to the orders of the General Government, and must, at its command, devote themselves to the performance of their governmental functions to the absolute exclusion of all other business. Not more absolute is the control of the General Government over the officers who command its steam frigates than is its control over the agents who constructed and who manage the transcontinental roads. The Government may, for the purposes of his creation, control every public and official action of a captain in the navy. All this may it do with these corporations, and it has assumed to do more—to control their relations with private parties and regulate the terms and conditions upon which they shall transact their private affairs. Congress has employed these corporations as a means to carry its powers into execution.

Can the State governments destroy either? This is one of the questions upon the solution of which depends the validity or invalidity of the State tax sought to be imposed upon the franchise or the right of the Central Pacific Railroad Company to exist and operate its lines.

The Power to Create Implies the Power to Preserve.

The power to create implies the power to preserve. The power to destroy, if wielded by a different hand, is hostile to and incompatible with the power to create and preserve. Where that repugnancy exists that authority which is supreme must control, not yield, to that over which it is supreme. "These propositions, as abstract truths," says Chief Justice Marshal (4 Wheat., 426), "would, perhaps, never be controverted."

Are these propositions applicable to the case in hand? Let us consider them separately, and in the order of inquiry the first will be—

Power of Congress to Select Its Means or Instrumentalities.

At this late date no argument would seem to be necessary to maintain the proposition that Congress possessed the power to select the Central Pacific Railroad Company and create it an agent of the General Government—to make it one of the means or instruments for the construction of a transcontinental railway and telegraph, and one of the means and instrumentalities by which the use of the same for postal, military, and other purposes could be secured to the Government. The Federal Constitution expressly confers upon Congress the power, among others, to provide for the common defense and general welfare of the United States; to establish post roads; to declare and carry on war, and to make all laws which shall be necessary and proper for carrying into execution the powers granted. With re-

spect to the means by which the powers it confers are to be executed the Constitution has been construed to allow to Congress that discretion which will enable it to perform the high duties assigned in the manner most beneficial. After Congress has acted it is not for the courts to determine whether the means selected are the best possible. Such considerations are for Congress alone. If the end be legitimate, if it be within the scope of the Constitution, then all means which are plainly adopted to that end, whether better ones could be found or not, may be constitutionally used by Congress.

McCulloch *vs.* Maryland, 4 Wheaton, 421.

We have seen that the declared purpose of Congress in providing for the construction of the transcontinental railway and telegraph was to "promote the public interest and welfare by the construction of said railroad and telegraph line and keeping the same in working order and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes." Was the end a legitimate one? Was it within the scope of the Constitution? In the progress of science railways have become mighty engines in the prosecution of military enterprises. Indeed their use may be said to have almost revolutionized the art of war. Not only are they proper means if the end be war, but they are admittedly necessary means without which no civilized nation would attempt to carry on warfare. This being so, then Congress would have the right to construct and to maintain them to subserve the public welfare. The power to construct and maintain necessarily includes the power to determine the mode and means of construction and maintenance and to select the instruments to keep the same in working order. In making this determination Congress created a corporation to construct and maintain the eastern section, and adopted a corporation already in existence to

construct and maintain the western section. As to both sections the object of Congress was the same. To authorize some person to construct the road and to impose upon the person authorized the duty of keeping it in repair and use, so that whenever required the "mails, troops and munitions of war" of the Government could be transported over it, and, if necessary, to the exclusion of all other traffic. This was the great purpose and object of the Government, and in this purpose and object Congress found the constitutional authority to act in the premises. The end was not to create one corporation or to adopt another, but was to create agents or instrumentalities and means through which certain governmental functions could be exercised. It created one *corporation* and made it such an instrument or agent. It found another corporation in existence and made it the means by which the power should in part be executed. Congress seized upon a State corporation and made it the instrument to execute its will. Congress by law gave it the right of way over the public lands; the right to contract debts and secure them by mortgage; the right to take and hold property; the right to build railroads in the Territories of the United States; the right to make contracts; the right to maintain ferries over navigable waters; the right to consolidate with other corporations, to adopt and use thereafter a corporate name, and to enjoy all the rights, privileges, and benefits conferred upon the Union Pacific. Congress by law made it the duty of the Central Pacific Railroad Company to keep the road and telegraph in repair and use, and to transmit on demand dispatches, mails, troops, and munitions of war for the Government. It reserved the right to regulate freights and fares, to enter for conditions broken, and to alter, amend, and repeal. These rights, privileges, powers, and duties conferred and imposed make the instrument bear a wonderful resemblance to a Federal corporation. In these times courts deal more with substance and less with form in construing laws,

and when we remember that no particular form of words or mode of expression is necessary to the creation of a corporation, it is difficult to conceive that Congress intended less than the creation of a national corporation. But it is not the name which the instrument bears, but the faculties with which it is endowed and the purposes for which it is used, which give it immunity. All the rights and privileges above enumerated, all the rights and privileges which the Union Pacific enjoy, are conferred upon the Central Pacific by the Federal Government; that the Central Pacific Railroad Company is an agent of the Government precisely as the Union Pacific Company is, to the same extent and for the same purposes, is not an open question. Such is the judgment of the Supreme Court of the United States.

Railroad Company *vs.* Peniston, 18 Wallace, 32.

The State Cannot Destroy the Agent Selected.

No one has ever seriously questioned the power of Congress to enact the laws in question, and we may safely assume that Congress, "to promote the public interest and welfare, * * * to secure to the Government at all times the use and benefit of the transcontinental road and telegraph," had the right to select the Central Pacific Railroad Company as an instrument, clothe it with the privileges and immunities given by law, and place it in charge of the western section of that road and telegraph line. Can the State destroy this agent? No one would have the temerity to contend that a State could repeal the laws which give to the Central Pacific its character as a national agent. Whatever Congress has the power to do the individual States have no right to undo. Its power to select an agent and place it in charge of the machinery of war, like its other leading governmental powers, is supreme. As Mr. Pinckney aptly remarks (4 Wheat., 391): "A power to build up what another may pull down at pleasure is a power which

can provoke a smile, but which can do nothing else." If the States cannot repeal the acts of Congress under which this corporation now exercises all its functions, it cannot indirectly accomplish the same purpose. This agent chosen by the Federal Government must continue to exist, enjoy its privileges and immunities, and perform its obligations so long as that Government wills. A constitutional law enacted by Congress to carry into execution the power vested in the General Government confers privileges and immunities and imposes obligations which no State can in any manner retard, impede, burden, or control (McCulloch *vs.* Maryland, 4 Wheat., 316; Osborn *vs.* Bank of United States, 9 Wheat., 738; Weston *vs.* City of Charleston, 2 Peters, 466). This, says Chief Justice Marshall (4 Wheat., 436), is "the unavoidable consequence of that supremacy which the Constitution has declared." And again (p. 425): "A law absolutely repugnant to another as entirely repeals that other as if express terms of repeal were used."

The Power to Tax is the Power to Destroy.

The power of the State to tax the franchise of the Central Pacific Railroad Company, its right to exist and operate, is incompatible with the power of the Federal Government to adopt and use it as a governmental agent or instrument.

Early Adjudications Defining the Relations which the Means or Instrumentalities of the General Government Bear to the States.

In expounding the relations which the means, instruments, and agencies of the General Government bear to the States "a splendor of eloquence and strength of argument seldom, if ever, surpassed" has been supplemented by judgments pronounced by the most illustrious of the line of great judges who have adorned the American bench. In the

investigations before us there are no strange waters to be traversed or new lands to be explored. The courses have been laid, the paths marked, and if we but follow them no mistake can be made.

In McCulloch *vs.* Maryland (4 Wheaton, 400) the defendant in error, the State of Maryland, denied the obligation of the law enacted by the Legislature of the Union creating the Bank of the United States, and the plaintiff in error on his part contested the validity of an act which had been passed by the Legislature of Maryland taxing the operations of the bank. The first question made in the cause was: Has Congress power to incorporate a bank? This question the Court answered in the affirmative. In discussing the question the nature of the General Government was inquired into, the conflicting powers of it and the State governments were brought into view, and the supremacy of their respective laws, when they are in operation, settled, and it was substantially held:

1. That the General Government emanates from and its powers were granted by the people; that, though its powers are limited, it is supreme within its sphere of action, and its laws, when made in pursuance of the Constitution, form the supreme law of the land.

2. That there is nothing in the Constitution of the United States which excludes the use of incidental or implied powers; that if the end be legitimate and within the scope of the Constitution all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited may be employed to carry it into effect.

3. That the power to established a corporation is not a distinct governmental power, but only the means of carrying into effect other powers.

4. That Congress in carrying into effect any of the powers expressly given by the Constitution is the sole judge of the mode and manner and means by which such power may be executed, and of the propriety and necessity thereof. The

question is one of legislative construction, and not of judicial cognizance.

The power to create a corporation as a substantive independent power does not exist in the General Government; but the Government having the right to do an act, and having the duty imposed upon it of performing that act, must, "according to the dictates of reason, be allowed to select the means." In the exercise of the right of selection it may seize upon any means already in existence and reasonably adapted to the purpose, and if no such means are in existence or the means already in existence are not, in the judgment of Congress, the best to the end, it may bring into existence that artificial being commonly known as a corporation, and make it an instrument through which the powers of government are to be exercised. It was not the fact that the General Government created a banking corporation which constituted that corporation a governmental agency. The creation of the corporation was a mere incident—the exercise of a power incident to the right of selection. It was the fact that Congress by law had endowed it with certain faculties relative to the fiscal operations of the Government which threw around it the protection of one government and shielded it from hostile legislation by the other. Nor is this mere matter of deduction or inference from the opinions of the Court. Chief Justice Marshall declares this to be so. "We do not," said the Chief Justice, "maintain that the corporate character of the bank exempts its operation from the action of State authorities. If an individual were to be endowed with the same faculties for the same purposes he would be equally protected in the exercise of those faculties." (Osborn *vs.* U. S. Bank, 9 Wheat., 362–3.)

The second question made in McCulloch *vs.* Maryland (4 Wheat., 425) was whether the State of Maryland might, without violating the Constitution, tax the branch of the United States Bank established in that State.

Counsel for the bank placed its claim to be exempted from the power of a State to tax its operations upon the paramount character of the Federal Constitution. On the part of the State it was contended, not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Federal Constitution leaves them this right in the confidence that it will not be abused. In examining these positions and subjecting them to the test of the Constitution, the Chief Justice, speaking for the Court, says:

"We must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the States. It is admitted that the power of taxing the people and their property is essential to the very existence of the Government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the Government may choose to carry it. The only security against the abuse of this power is found in the structure of the Government itself. In imposing a tax the Legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their Government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituents over their representatives to guard them against its abuse. But the MEANS employed by the Government of the Union have no security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the Legislature, which claims the right to tax them, but by the people of all the States. They are given by all, for the benefit of all, and, upon theory, should be subjected to that government only which belongs to all" (pp. 428, 429).

Again, the Court say:

"There is no express provision for the case, but the claim" (the claim of counsel of bank to be exempted from the power

of the State to tax its operations) "has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rendering it into shreds. This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States and cannot be controlled by them" (p. 426).

Again:

"That the power of taxing it" (the bank) "by States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power which acknowledges no other limits than those expressly prescribed in the Constitution, and, like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to and may be controlled by the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction no principle not declared can be admissible which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action in its own sphere and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain (*id.*, p. 427).

To give effect to this supremacy the Court construes the Federal Constitution as placing beyond the reach of the State all the powers which are conferred by the people of the United States on the Government of the Union and all of the means which are selected for the purpose of carrying those powers into execution. It maintains that by so doing relief is had from clashing sovereignty and from interfering powers; "from a repugnancy between a right in one gov-

ernment to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use and what degree may amount to the abuse of the power. The attempt to use it" (the taxing power) "on the means employed by the Government of the Union in pursuance of the Constitution is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.

"We find, then, on a just theory, a total failure of this original right to tax the means employed by the Government of the Union for the execution of its powers. The right never existed, and the question whether it has been surrendered cannot arise" (p. 430).

Still pursuing the subject, the Court asserts: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. * * * The Legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all in the confidence that it will not be abused. * * * The question is, in truth, a question of supremacy; and if the right of the State to tax the means employed by the General Government be conceded the declaration that the Constitution and the laws made in pursuance thereof shall be the supreme law of the land is an empty and unmeaning declamation."

The judges were unanimous in the conclusion "that the States have no power, by taxation or otherwise, *to retard*, *impede*, *burden*, or in any manner control the operation of the

constitutional laws enacted by Congress to carry into execution the powers vested in the General Government" (p. 436).

In McCulloch *vs.* Maryland the tax involved was a stamp tax sought to be imposed by the State of Maryland upon the paper upon which the notes of the bank were printed. The tax was held unconstitutional upon the ground that it was "a tax on the operation of an instrument *employed* by the Government of the Union to carry its powers into execution" (p. 437). It was not unconstitutional because it imposed a tax upon the operations of a Federal corporation, but because it imposed a tax upon "an instrument employed by the Government." The test of immunity was not the corporate character, but the purpose for which it was used by the General Government.

The next case in order is that of Osborn *vs.* U. S. Bank (9 Wheaton, 738). The State tax, the validity of which was attempted to be maintained in Osborn *vs.* U. S. Bank, was a tax laid by the Legislature of Ohio upon the right of the branch banks to do business in that State. It seems to have been conceded by counsel for the plaintiff in error, the party maintaining the validity of the tax, that the Government had the right to preserve the bank as its agent or instrument; but a distinction was sought to be made between the tax in question—a tax upon the business of the bank—and a tax levied upon the corporate franchise or right of the agent to exist. The Court held that no such distinction existed. "That to tax its faculties, its trade, and occupation is to tax the bank itself; to destroy or preserve the one is to destroy or preserve the other" (p. 862).

At this point in the argument we desire to bring into prominence the fact that in Osborn *vs.* U. S. Bank it was held that there was no distinction between a tax upon the right of the instrument to exist and a tax upon the operations of the instrument, and that this being so all that was said in McCulloch *vs.* Maryland relative to the power of a

State to tax the operations of a governmental agent applies with equal force when right to tax the existence of the agent is in question.

In their order, the next case is that of Weston *vs.* The City of Charleston (2 Peters), 449. This case arose out of an attempt on the part of the city of Charleston to levy a tax of 25 cents upon every $100 of the 6 and 7 per cent. stock of the United States owned and possessed within the limits of that city. The Court, Chief Justice Marshall rendering the decision, held the case to be within the principle settled in McCulloch *vs.* The State of Maryland, and reaffirmed the opinion in that case. In the argument it was not denied that the States could not tax any of the instruments or means used by the General Government in the execution of its powers (p. 479). But it was contended that only such taxes as were directly laid upon the means or instrument fell within the inhibition of the Federal Constitution. In answer to this argument the Court said that any law directly obstructing the operation of a constitutional act of Congress or hindering, impeding, or burdening its operation was admittedly void, and that no distinction could be taken between direct opposition and those measures which may consequently affect the means.

After many years had elapsed, and when the great lawyers and judges who had participated in the discussions and decisions before referred to were resting in honored graves, another generation of judges and lawyers came to the consideration of the grave question involved. The Legislature of the State of Pennsylvania passed a law which authorized the assessment of a State and county tax upon "all offices and posts of profit." One Daniel Dobbins, a citizen and resident of the State of Pennsylvania, a captain in the revenue cutter service of the United States, commanding the revenue cutter "Erie," on the Erie station, was assessed under this act upon the office which he held. He resisted the payment of the tax. Suit was brought in the State courts to enforce

it, and judgment was finally rendered by the supreme court of Pennsylvania sustaining the tax. Captain Dobbins brought the case to the Supreme Court of the United States by a writ of error. (Dobbins *vs.* The Commissioners of Erie County 16 Peters, 435.) In the Supreme Court of the United States counsel for the defendant in error admitted that a State tax upon the hull and apparel of the revenue cutter commanded by Captain Dobbins would have been unconstitutional for the reason that the cutter "was the 'means' or 'instrument'" of the Government. (Counsel might also have placed his admission upon another ground—*i. e.*, that the cutter was the property of the United States.) But he maintained that the tax by the State was not of such instrument, but of *one of her citizens* whose income was rated to fix the amount of his contribution to the public burden. The Court, after clearing the case of objections which did not relate to the constitutionality of the tax, proceeded to discuss the question "whether the plaintiff is liable to be rated and assessed for his office under the United States for county rates and levies."

Say the Court (p. 447):

"Taxation is a sacred right, essential to the existence of government, an incident of sovereignty. The right of legislation is coextensive with the incident to attach it upon all persons and property within the jurisdiction of a State, but in our system there are limitations upon that right. There is a concurrent right of legislation in the State and the United States, except as both are restained by the Constitution of the United States; both are restrained upon this subject by express prohibitions in the Constitution; and the States by such as are necessarily implied when the exercise of a right by the State conflicts with the perfect execution of another sovereign power delegated to the United States; that occurs when taxation by a State acts upon the instruments, emoluments, and persons which the United States may use and employ as necessary and proper means to execute their sovereign power. * * * Congress has power to lay and collect taxes, duties, imposts, etc., and to regulate commerce

with foreign nations and among the several States and with the Indian tribes. Neither can be done without legislation."

The Court held that to do either a complicated machinery of forms, instruments, and persons must be established and that laws to these ends constitute legislation by Congress in execution of sovereign powers. "They are the means necessary to the allowed end; the end, the great objects which the Constitution was intended to secure to the States in their character as a nation" (p. 448).

In applying the principles stated to the case in judgment the Court say:

"Is the officer as such less a means to carry into effect these great objects than the vessel which he commands, the instruments which are used to navigate her, or the guns put on board to enforce obedience to the law? These inanimate objects, it is admitted, cannot be taxed by a State, because they are means. Is not the officer more so who gives use and efficacy to the whole?" (p. 448).

"The unconstitutionality" (of the tax in question) "may be safely put—though is not the only ground—upon its interference with the constitutional means which have been legislated by the Government of the United States to carry into effect its powers to lay and collect taxes, duties, imposts, etc., and to regulate commerce. In our view it presents a case of as strong interference as was presented by the tax imposed by Maryland, in the case of McCulloch (4 Wheaton, 316), and the tax of the city council of Charleston, in Weston's case (2 Peters, 449), in both of which it was decided by this Court that a State cannot lay a tax upon the constitutional means employed by the Government of the Union to execute its constitutional powers" (p. 449).

The other ground upon which the Supreme Court of the United States held that the immunity might be tested was the exemption of the salaries of all officers of the United States from taxation by the States; but the main ground upon which it held it might safely be placed was that of

interference by the States with the means employed by the Government of the Union to execute its powers. Bearing this proposition steadily in view, let us now consider whether, if Congress, instead of constructing the revenue cutter "Erie" in a navy yard of the United States, had seen proper by law to authorize Captain Dobbins to construct it, and had loaned him the money of the Government to aid in such construction and had taken a mortgage upon the vessel to secure that loan, and had authorized Captain Dobbins to use the vessel in part in private business, reserving the right to control that business to a certain extent, but requiring him at all times to hold himself and the vessel to which he held the legal title in readiness to execute the orders of the Government relating to the revenue service on Lake Erie, and let us further suppose that Congress, instead of fixing his compensation, had allowed him to receive it from the private business in which he was engaged; in this event would the relation of Captain Dobbins or of his ship toward the National Government have been changed? The relation of the ship, in one respect, would have changed, for the Government, instead of holding the legal title to it, would only hold a mortgage upon it.

Whether it still bore to the Government such a relation of means to an end as to exempt it from State taxation is a grave and serious question, upon which it will be seen during the course of this argument the Supreme Court of the United States has been almost evenly divided, but granting, for the purposes of the argument, that in both respects the relation of the vessel to the United States would be changed, yet it is clear that the relation of Captain Dobbins would remain the same. To prove that this is so we refer again to Osborn *vs.* U. S. Bank (9 Wheaton, 863), where it is said:

"We do not maintain that the corporate character of the bank exempts its operations from the action of State authority. If an individual were to be endowed with the same

faculties, for the same purpose, he would be equally protected in the exercise of those faculties.

"The operations of the bank are believed not only to yield the compensation for its services to the Government, but to be essential to the performance of these services. * * * The business of the bank constitutes its capacity to perform its functions as a machine for the money transactions of the Government. Its corporate character is merely an incident which enables it to transact that business more beneficially.

"Were the Secretary of the Treasury to be authorized by law to appoint agencies throughout the Union to perform the public functions of the bank and to be endowed with its faculties as a necessary auxiliary to those functions the operation of those agents would be as exempt from the control of the States as the bank and not more so. If, instead of the Secretary of the Treasury, a distinct office were to be created for the purpose, filled by a person who should receive as a compensation for his time, labor, and expense the profits of the banking business instead of other emoluments, to be drawn from the Treasury, which banking business was essential to the operation of the Government, would each State in the Union possess a right to control these operations?

"The question on which this right would depend must always be, Are these faculties so essential to the fiscal operation of the Government as to authorize Congress to confer them? Let this be admitted, and the question, Does the right to preserve them exist? must always be answered in the affirmative" (pp. 863, 864).

It having been authoritatively determined in Osborn *vs.* The United States Bank that so far as immunity was concerned there was no distinction between a tax upon the means or agent and a tax upon the operations of the means and the agent—that one was the equivalent of the other—therefore, upon the authority of that case and upon the case of Dobbins *vs.* The Commissioners, it may be safely asserted that the relation of Captain Dobbins to the United States would remain unchanged, although the vessel which he

commanded was his own private property and not within the immunity.

Then how stands the case of the Central Pacific Railroad Company, assuming it to be, strictly speaking, a State corporation only? It is a citizen and resident of the State of California as Captain Dobbins was a citizen and resident of the State of Pennsylvania. The Congress of the United States has seized upon it as a means to execute the war power of the National Government as Congress selected Captain Dobbins as a means to execute the revenue powers. Congress has placed it in charge of a national work, originating in national necessities, and having as its end the promotion of the welfare of the whole country.

In each case the primary object of the Government was to advance its own interests—in the one to secure a vessel and the other to secure a road which could be used for national purposes. In both the person who commands and controls, who gives effect to this congressional intent, is an agent or means to the end, and must be within the protection of the Federal Government, or the purposes and intent of that Government would be at the mercy of hostile legislation by the States.

The Transcontinental Roads Were Born of War.

The transcontinental road, dedicated now chiefly to the promotion of the peaceful arts, was born in war. It is true that a few of the prominent men of the nation had long looked forward to such a work, and that the people of California, forming an isolated community, had, as early as May 1, 1852, through their Legislature, declared "that the interests of this State, as well as those of the whole Union, require the immediate action of the Government of the United States for the construction of a national thoroughfare connecting the navigable waters of the Atlantic and Pacific Oceans for the *purposes of national safety in the event of war* and to

promote the highest commercial interests of the Republic," *and granted the right of way through the State to the United States for the purpose of constructing such a road.* (Statutes California, 1852, p. 150.) Again, in 1859, the Legislature passed a resolution calling a convention " to consider the refusal of Congress to take efficient measures for the construction of a railroad from the Atlantic States to the Pacific and to adopt measures whereby the building of said road can be accomplished " (Statutes Cal., 1859, p. 391); and at the same session the Legislature memorialized Congress to pass a law *authorizing the construction* of such a road and asking that lands be granted in aid thereof. (Statutes, 1859, p. 395.) These various measures of the State of California are referred to to show that in the judgment of the State the work was a proper one for the Federal Government and national in its character; but nothing came of these acts and resolves. It was only when war, in fact, was at hand that the National Government moved in the premises.

The Work a National One.

We have seen that the State of California had uniformly characterized the work as a national one; that Congress declared the purpose of the act of 1862 to be " to promote the public welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefit of the same for postal and military and other purposes." (Sec. 18, act of 1862.) Here, then, we have the declaration of the legislative department of both State and Federal Government that the paramount purpose of the road is a national one, and that the means by which it was to be constructed and used were national means.

Some Adjudications Upon the Relations of the Pacific Railroads to the National Government.

We come now to consider how the judicial department of the Federal Government has construed the Pacific railroad acts and what that department has said upon the question—whether the transcontinental road is a national machine and the persons in charge of it agents of the Federal Government to carry into execution its lawful purposes; whether or not such persons have been selected by the General Government as means to the ends sought to be attained by the Pacific railroad acts. In the case of the United States *vs* Union Pac. R. R. Co. (91 U. S., 79) the Court say:

"Although a free people, when resolved upon a course of action, can accomplish great results, the scheme for building a railroad two thousand miles in length, over deserts, across mountains, and through a country inhabited by Indians jealous of intrusion upon their rights, was universally regarded at the time as a bold and hazardous undertaking. It is nothing to the purpose that the apprehended difficulties in a great measure disappeared after trial, and that the road was constructed at less cost of time and money than had been considered possible. No argument can be drawn from the wisdom that comes after the fact. Congress acted with reference to a state of things believed at the time to exist, and in interpreting its legislation no aid can be derived from subsequent events. The project of building the road was not conceived for private ends, and the prevalent opinion was that it could not be worked out by private capital alone. It was a national work, originating in national necessities, and requiring national assistance.

"The policy of the country, to say nothing of the supposed want of constitutional power, stood in the way of the United States taking the work into its own hands. Even if this were not so reasons of economy suggested that it were better to enlist private capital and enterprise in the project by offering the requisite inducements. Congress undertook to do this in order to promote the construction and operation of a work deemed essential to the security of great public interests.

"It is true the scheme contemplated profit to individuals; for, without a reasonable expectation of this, capital could not be obtained nor the requisite skill and enterprise; but this consideration does not in itself change the relation of the parties to this suit. This might have been so if the Government had incorporated a company to advance private interests and agreed to aid it on account of the supposed incidental advantages which the public would derive from the completion of the projected railway; but the primary object of the Government was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end—the securing a road which could be used for its own purposes. The obligations, therefore, which were imposed on the company incorporated to build it must depend on the true meaning of the enactment itself viewed in the light of contemporaneous history.

"It has been observed by this Court that the title of an act, especially in congressional legislation, furnishes little aid in the construction of it, because the body of the act in so many cases has no reference to the matter specified in the title. (Hadden *vs.* The Collector, 5 Wall., 110.) This is true, and we have no disposition to depart from this rule; but the title, even, of the original act of 1862, incorporating the appellee, seems to have been the subject of special consideration, for it truly discloses the general purpose of Congress in passing it. It is 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the Government the use of the same for postal, military, and other purposes.' That there should, however, be no doubt of the national character of the contemplated work the body of the act contains these significant words: 'And the better to accomplish the object of this act—namely, to promote the public interest and welfare by the construction of said railroad and telegraph line and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes—Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or appeal this act.' (12 Stat., p. 497.) Indeed, the whole act contains unmistakable evidence that if Congress was put to the necessity of carrying on a great public enterprise by the instrumentality of private corporations it took care that

there should be no misunderstanding about the objects to be attained or the motives which influenced its action.

"If it had been equally explicit in the provisions regarding the bonds to be issued in aid of the company there would have been no occasion for this suit; but even in this particular, looking to the motives which prompted the act and to the objects intended to be affected by it, we do not think there is any serious difficulty in getting at the true meaning of Congress. The act itself was an experiment. It must be considered in the nature of a proposal to enterprising men to engage in the work; for, with untried obstacles in the way, there was no certainty that capital could be enlisted. If enlisted at all it could only be on conditions which would insure, in case of success, remuneration proportionate to the risk incurred."

The object was "protection to the people" of the Pacific coast. The road was viewed as a "national undertaking for a national purpose." It was a "military necessity." The project "was not conceived for private ends;" it "originated in national necessities." "Profit to individuals" was contemplated, "but this consideration does not in itself change the relation of the parties." The "primary object of the Government was to advance its own interests." Individual co-operation was an incident—"a means to an end"—that end the "securing of a road which could be used for national purposes." The Central Pacific Railroad Company was one of the "means" which Congress selected to secure the end. Congress charged it with the construction and maintenance of the road, gave it command of a national instrument, and the question now is, Does that corporation, in the economy of Government, rank with and enjoy the immunities of the captain of a revenue cutter "on the Erie station?"

Later Adjudications Upon the Relations which the Means or Instrumentalities of the General Government Bear to the States.

The Union Pacific Railway Company, Eastern Division, is the corporation mentioned in section 9 of the railroad act of 1862 as the "Leavenworth, Pawnee and Western Railroad Company of Kansas." It was chartered by the Legislature of the Territory of Kansas, and subsequently by the State of Kansas. The Pacific railroad act of 1862 constituted it one of the companies which, in connection with the Union Pacific and Central Pacific, was to construct and maintain the transcontinental road. To the Union Pacific railroad, chartered by Congress, it bears the same relation as the Central Pacific, with this exception, that the provision in the act of 1864, section 16, which provides that the Central Pacific Railroad Company shall "enjoy all the rights, privileges, and benefits conferred by this act upon the said Union Pacific Railroad Company," had no application to the Kansas Company. After the road was completed through the State of Kansas the Legislature passed a law laying certain taxes upon the tangible property of the company within the jurisdiction of the State. The payment of these taxes was resisted by the company upon the ground that it was an agent of the General Government, and that a tax upon its property would retard, impede, burden, and control the company in the discharge of its duties and obligations to the Federal Government. The issue thus made came before the Supreme Court of the United States for determination in Thompson *vs.* The Pacific R. R. (9 Wallace, 579). The question for determination, as stated by the Court, was, "Can the right of this road to exemption from such taxation (*i. e.*, upon its tangible property) be maintained in the absence of any legislation by Congress to that effect?" (p. 589). The Court, after reviewing the various cases bearing upon the question, say: "We fully recognize

the soundness of the doctrine that no State has a right to tax the means employed by the Government of the Union for the execution of its powers, but we think there is a clear distinction between a means employed by the Government and the property of agents employed by the Government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always nor generally taxation of the means" (p. 691). The Court determined that the tax levied by the State of Kansas, being upon the property and not upon the agency itself, was not within the immunity, and the act of the Legislature of the State of Kansas was constitutional and could be enforced. Some expressions in the opinion delivered by the Chief Justice in the case just cited led to the belief that the Court might maintain that there was a distinction between the property of the agent, if that agent was a State corporation, and the property of the agent when that agent was a Federal corporation.

But in the case of The Railroad Co. *vs.* Peniston (18 Wallace, p. 5) it was held that no such distinction existed, and that the question was not whether it was a Federal or State corporation, but that the immunity rested upon the fact that the person or corporation claiming it had been selected by the General Government as an agent in the execution of its powers. In that case the tax involved was one laid by the State of Nebraska upon the tangible property of the Union Pacific railroad, a corporation created by Congress. The Court in its opinion refers to the case of Thompson *vs.* U. P. R. R. Co. (9 Wallace), and says:

"It is true that in the opinion delivered by the Chief Justice reference was made to the fact that the defendants were a State corporation, and an argument was attempted to be drawn from this to distinguish the case from McCulloch *vs.* The State of Maryland" (p. 36).

"But," say the Court, "when the question is, as in the present case, whether the taxation of property is taxation of means, instruments, or agencies by which the United States

carries out its powers, it is impossible to see how it can be pertinent to inquire whence the property originated or from whom its present owners obtained it. The United States have no more ownership of the road authorized by Congress than they had in the road authorized by Kansas. If the taxation of either is unlawful, it is because the States cannot obstruct the exercise of national powers" (p. 34).

"There is no difference which can be pointed out between the nature, extent, or purposes of their agency and those of the corporation complainant in this particular case" (p. 33).

"As was said in Weston *vs.* Charleston, they (the States) cannot, by taxation or otherwise, 'retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.' The implied inhibition, if any exists, is against such obstruction, and that must be the same, whether the corporation whose property is taxed was created by Congress or by a State Legislature."

Reference is then made by the Court to the fact that in McCulloch *vs.* Maryland the tax was upon the operation of the agent; that in the case of Osborn *vs.* The Bank the tax was upon its right to transact business, and that a clear distinction was taken between the right of a State to tax the operation or existence of the agent and a right to tax its tangible property within the jurisdiction of the State, "and this distinction," says the Court, "so clearly drawn in the earlier decisions between a tax on the property of a governmental agent and a tax upon the operation of such agent or upon his right to be has ever since been recognized" (p. 36).

And again: "It is therefore manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax—that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property

has no such necessary effect; it leaves them free to discharge the duties which they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercises of the Federal power" (p. 37). And further: "In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in Thompson *vs.* The U. P. R. R. Co. It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being" (p. 37).

The cases last cited are in harmony with the earlier decisions, and also with the principle laid down in the case of The Collector *vs.* Day (11 Wallace, 127), in which it said: "The exemption rests upon necessary implication and is upheld by the great law of self-preservation, as any government whose means employed in conducting its operation, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power can tax them at discretion?"

The national bank cases hold that it is competent for Congress, in the establishment and arrangement of these means and agencies, to concede to the State such measures and modes of taxation as Congress deems consistent with the safety and efficiency of these means and agencies to execute the powers of the General Government—that is, taxation not by predominance of State authority, but by virtue of Federal submission of the subject to State taxation upon motives of Federal policy. But this concession is not a judicial question. The judicial conclusion excludes the taxation of the Federal means and agencies and requires the express assent of Federal authority to support State taxation and fix its mode and its measure. (Osborn *vs.* The Bank of U. S., *supra.*)

In no subsequent case has the force of the reasoning or the weight of the authority of the cases of McCulloch *vs.* Maryland and Osborn *vs.* The Bank of the United States

been in the least abated; but, on the contrary, the principles established in those cases stand unbroken and impregnable.

In The Railroad Co. *vs.* Peniston (18 Wallace, 5) this Court, by the clearest implication, maintain that if the tax complained of in Thompson *vs.* U. P. R. R. Co. or The Railroad *vs.* Peniston had been imposed upon the franchises—the right of the company to exist—it would not have been a tax within the province of the State government to impose, but one prohibited by the Constitution of the United States. While upon this question the Court is unanimous, a majority determined that the tangible property of the companies, parties to those suits, was not within the immunity claimed, but the Court divided nearly evenly, the minority holding that the exemption extended not only to the existence and being of the agent, but to all of its property within the States.

Congress, by act of July 1, 1862, and an amendatory act of 1864, devolved upon the Central Pacific Railroad Company, individually and personally, the power and duty of constructing, maintaining, and operating the western division of the transcontinental railroad. That company cannot divest itself of these powers and duties without the express consent of Congress. (1 McCrary's C. C. Rep'ts, 192.)

Wood *vs.* Truckee Turnpike Co., 24 Cal., 486.
Thomas *vs.* Armstrong, 7 Cal., 286.
Monroe *vs.* Thomas, 5 Cal., 470.

The same acts made it the duty of these companies to operate the transcontinental road as one continuous line. That duty can be, and in the case of the Union Pacific Railroad Company, Eastern Division, has been, enforced by mandate. The privileges and duties of these corporations, derived from and due to the Federal Government, are, as we have seen, personal in their nature. They cannot voluntarily divest themselves of either; nor can the right to perform the same be transferred without the consent of Con-

gress, either voluntarily or by forced sale. How, then, can it be said that a State tax upon the right of either company to exist could be enforced without hindering, delaying, or impeding the operations of the acts of Congress in question?

Department No. 1 of the supreme court of California (C. P. R. R. Co. *vs.* S. B. of Eq., 1882) maintains that the right of the corporation to exist is derived from the State of California. Conceding that to be true, nevertheless Congress, under the power to make war, has the right to seize upon this State corporation and convert it into an instrumentality or means to that end, and, having done so, the existence of a power in the State to destroy that instrument cannot be admitted.

Let us take an illustration not stronger, perhaps, than the case itself. Suppose that the Federal Government should acquire from the government of Nicaragua the right to construct an interoceanic canal across its territory, and that Congress in its wisdom should declare the Central Pacific Railroad Company an agent of the Federal Government to construct that work, and should authorize the company to maintain the same and hold it upon demand, subject to the exclusive use of the United States for military purposes, would it be contended that the State of California could destroy the Central Pacific Railroad Company and thus nullify the action of the Federal Government?

If the State should attempt the destruction of the company, and it should interpose in its defense the act of Congress, the question would not and could not be whether the company was a Federal or a State corporation, but would be whether or not the Federal Government had selected it as a means or instrument to carry into execution the powers granted to that Government, and this question determined in the affirmative would, in so far as it derived its rights and privileges from the national Government, place the company beyond the reach of the attacks made by the State either upon its existence or upon its operations.

The exemption from State interference results not from the fact that Congress has declared that the State shall not interfere but from the fact that the Constitution of the United States and the laws made in pursuance thereof are supreme.

In the opinion of the supreme court of California some force is given to the fact that Congress has passed no act exempting the property of the Central Pacific Railroad Company from taxation. In Osborn *vs.* United States Bank (7 Wheat., 3 W.) it was contended that Congress must declare the exemption from State taxation, and that it was not to be implied by the Court, but the Court held to the contrary. Indeed, Congress has no substantive power to exempt property from State taxation, and any provision to that effect in an act of Congress would be inoperative.

The presence or absence of an exemption clause in the act of Congress does not and cannot affect the extent or operation of the act of Congress. Congress has no power to revoke State laws. It legislates over subjects; and over those subjects which are within its power its legislation is supreme, and necessarily overrules all inconsistent or repugnant State legislation. If the law of a State imposing a tax upon the franchise is opposed to or inconsistent with any constitutional power which Congress has exercised, then, so far as the incompatibility exists, the law is nugatory and void, necessarily, and by reason of the supremacy of the law of Congress. The Constitution gives to them supremacy when State laws oppose them, and the only question is whether there is or is not a repugnancy or hostility between the law of Congress and the law of the State. If it should be admitted that Congress, by express terms, could have exempted this franchise from State taxation, the whole argument is effectually given up, because such terms would add nothing to the effect and operation of an act of Congress. If the tax be not inconsistent with—if it does not impede or affect the exercise of the powers of Congress, Congress would have no authority to exempt the franchise from its operation. If the

tax is inconsistent with or impedes or affects the exercise of the power, it is, as we have seen, for that reason alone, necessarily void.

A State law is powerless to take away, restrain, or abridge that which the Federal authority has lawfully given, and it is immaterial whether the privilege or immunity exists as an implication under some provision of the Constitution or laws or is expressly declared and established. (Pomeroy's Const. Law, p. 248.)

The cases which we have cited upon this question are all ably reviewed, Mr. Justice Gray delivering the opinion of the Court, in Van Brocklin *vs.* The State of Tennessee (117 U. S., 151).

The learned justice says:

"While the power of taxation is one of vital importance retained by the States not abridged by the grant of a similar power to the Government of the Union, but to be concurrently exercised by the two Governments, yet even this power of a State is subordinate to and may be controlled by the Constitution of the United States.

"That Constitution and the laws made in pursuance thereof are supreme; they control the constitutions and laws of the respective States and cannot be controlled by them. The people of a State give to their Government a right of taxing themselves and their property at its discretion; but the means employed by the Government of the Union are not given by the people of a particular State, but by the people of all the States, and, being given by all for the benefit of all, should be subjected to that Government only which belongs to all.

"All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission, but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States."

Referring again to the act of Congress under which this transcontinental road was built and under which it is operated, we find this provision contained in the sixth section:

"That the grants aforesaid are made upon condition that said companies shall pay said bonds at maturity, and shall keep said railroad and telegraph lines in repair and use, and shall at all times transmit dispatches over said telegraph line and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid."

It cannot at this day be denied that Congress has the constitutional authority to enact this law. It has the express authority to establish post routes and to make war and, by implication, has power to do every act which may be necessary to carry into execution these express powers.

These powers are exercised not for the benefit of the people of any particular State, but for the people of all the States. They were given to Congress for the benefit of all, and can be subjected only to the Government to which belongs to all. Over neither of these subjects does the power of the State extend, and therefore they cannot be the subjects of State taxation. The defendant, The Central Pacific Railroad, is bound by the act of Congress to keep in repair and in use its line of railroad and telegraph. It is bound to transmit Government messages over its telegraph lines and transport over its road the mails, the troops, the munitions of war, supplies, and public stores. These are, in fact, the great purposes for which Government aids were granted. That a State can tax the right to so use the road and telegraph line would seem not to admit of argument.

The learned justice, pursuing the same subject, says:

"The attempt to use the taxing power of a State on the means employed by the Government of the Union, in pursuance of the Constitution, is itself an abuse, because it is

the usurpation of a power which the people of a single State cannot give. The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a strange repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control.

"The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

In Pollard's Lessee *vs.* Hagan (3 Howard, U. S., p. 225) Mr. Justice McKinley, speaking for the Court, said:

"Every constitutional act of Congress is passed by the will of the people of the United States expressed, through their representatives, on the subject-matter of the enactment, and when so passed it becomes the supreme law of the land and operates by its own force on the subject-matter in whatever State or Territory it may happen to be."

So far from it being necessary for Congress, when it selects the means through which the powers are to be executed, to declare that such means shall not be subject to State taxation and that the State shall do nothing to hinder or impede the operation of the law, it is extremely doubtful whether Congress could in any such case confer upon the State power to interfere in any way with the subject-matter.

It is a serious question whether Congress could authorize a State to tax the means and instrumentalities of the Federal Government. If Congress could do this, then it is in the power of Congress, acting in conjunction with some of the States, to destroy the National Government. It could authorize a State or any number of States to impose such burdens upon the operations of the National Government as to render the operations impossible. If Congress can confer

the power to tax the means employed by the Government of the Union it can confer the power to destroy, for the power to tax involves the power to destroy.

That every constitutional act of Congress becomes the supreme law of the land and operates by its own force upon the subject-matter in whatever State or Territory it may happen to be, and that no State can in anywise interfere with such operations, seems now to be beyond the domain of argument.

A tax upon the right of the Central Pacific Railroad Company to exist and to do business is a tax upon interstate commerce and is obnoxious to the commerce clause of the National Constitution. For this reason and for the further reason that the State Board of Equalization had no authority under the laws of the State of California to impose a tax upon business or to value such business in making the assessment the tax imposed is void.

In the case of The Philadelphia and Southern Mail Steamship Company *vs.* The Commonwealth of Pennsylvania (122 U. S., 335) the question arose as to whether a State could constitutionally impose upon a steamship company incorporated under its laws a tax upon the gross receipts of such company derived from the transportation of persons and property by sea between different States and to and from foreign countries.

This question was answered in the negative upon the ground that the power to regulate commerce was a national power and that no State could, by taxation or otherwise, interfere with its exercise.

Mr. Justice Bradley, speaking for the Court, said:

"The question which underlies the immediate question in the case is whether the imposition of the tax upon the steamship company's receipts amounted to a regulation of or an interference with interstate and foreign commerce, and was thus in conflict with the power granted by the Constitution to Congress. The tax was levied directly upon the receipts derived by the company from its fares and freights

for the transportation of persons and goods between different States and between the States and foreign countries and from the charter of its vessels, which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was that and nothing else. In view of the decisions of this Court it cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself; but taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation either by its tonnage or its distance or by the number of trips performed or in any other way would certainly be a regulation of the commerce, a restriction upon it—a burden upon it. Clearly this could not be done by the State without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulations imposed by the States upon that branch of commerce would be a palpable interference. If Congress has not made any express regulations with regard to interstate commere its inaction, as we have often held, is equivalent to a declaration that it shall be free in all cases where its power is exclusive, and its power is necessarily exclusive whenever the subject-matter is national in its character and properly admits of only one uniform system. See the cases collected in Robbins *vs.* Shelby Taxing District (120 U. S., 489, 492, 493.) Interstate Commerce carried on by ships on the sea is surely of this character."

Again he says:

"If the regulation of the transportation belongs to the power of Congress to regulate commerce the regulation of fares and freights receivable for such transportation must equally belong to that power, and any burdens imposed by the State on such receipts must be in conflict with it."

In the case at bar the proposition is equally applicable. Congress, under the power to declare war, under the power to establish post routes, under the power to promote the public welfare, selected these roads—these companies—as the instruments of the Government. It is not only their right but their duty to exist and to operate, and every burden imposed by a State on the right of these companies to exist, to

operate, and to carry into execution the powers conferred by Congress upon them must conflict with the national law from which those rights and powers are derived.

Again the Court say, quoting Chief Justice Strong, in another case:

"The State may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional it is not cured by including in its provisions subjects within the jurisdiction of the State."

Apply this principle to the case at bar and we may admit that the State may impose a tax upon the rights of the Central Pacific Railroad Company obtained from the State, but this fact does not authorize it to include within the tax the rights and privileges conferred upon the company by the National Government and for national purposes. If the Court does not take judicial notice of the law under which these roads were built, yet the existence of such laws are pleaded and found in the case. The Court will take judicial notice of the country; that this line of road is transcontinental; that it crosses the line of States and Territories; that it is operated as one continuous line, and that its operations include interstate commerce.

Not more exclusive is the jurisdiction of Congress over interstate commerce than is the jurisdiction over post routes and its authority to transport munitions of war and other military stores.

It is clear upon principle that the franchise to carry on interstate commerce cannot be subject to taxation by the States.

The case last cited is conclusive upon that subject. Said the learned judge:

"It certainly could not have been intended as a tax upon the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other States doing bnsiness in Pennsylvania. If intended as a tax on the fran-

chise of doing business—which in this case is the business of transportation in carrying on interstate and foreign commerce—it would clearly be unconstitutional."

We ask if it is not as clearly unconstitutional to impose a tax upon the business of transporting the Government mails, upon transporting its munitions of war, and upon performing the duties imposed upon a corporation or person by the Government of the United States for any national purpose. But why ask this question? The answer would not help us. The tax here is imposed upon the business of interstate commerce as well as upon the business of transporting troops, etc.

We quote further from the Steamship Company *vs.* Pennsylvania:

"Nor does it make any difference whether such commerce is carried on by individuals or corporations."

* * * * * * *

"It is hardly necessary to add that the tax on the capital stock of the New Jersey company in that case was decided to be unconstitutional, because, as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business with interstate commerce."

* * * * * * *

"But their business as carriers in foreign or interstate commerce cannot be taxed by the State under the plea that they are exercising a franchise."

* * * * * * *

"The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State, but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce *or any other matter exclusively within the jurisdiction of the Federal Government.*

"This is a principle so often announced by the courts, and especially by this Court, that it may be received as an axiom of our constitutional jurisprudence."

Now, mark the language: "The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State, but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce *or any other matter exclusively within the jurisdiction of the Federal Government.*"

Recurring again to the record (case No. 664, subdivision XXIX of answer, folio 48) the averment is as follows:

"Said pretended assessment made by the State board of equalization is upon all of the franchises of defendant, and the said board, in valuing the same, included the value of all the franchises and corporate powers held and exercised by defendant under said acts of Congress."

The findings respond fully to the issue made by this averment and is as follows (finding XXX, folio 120):

"Said pretended assessment made by the State board of equalization and the tax claimed is upon all of the franchises, the existence, and operation of defendant, and upon all the franchises and corporate powers held and exercised by defendant, as well as its right to exist and operate."

The subject-matter of the acts of Congress under which the transcontinental roads were built were within the exclusive jurisdiction of the National Government. The principle of the case from which we have quoted at length was the very principle which the defendants availed themselves of when the State attempted to interfere with and hamper the exercise by it of the powers which Congress constitutionally conferred.

Very much light will be thrown upon this contention by an examination of the able and elaborate opinion of Mr. Chief Justice Waite, delivered in the case of the Pensacola Telegraph Company *vs.* The Western Union Telegraph Company, reported in 6 Otto, page 6 to 124.

On the 24th of July, 1886, Congress had passed an act entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes." The title of this act is very similar to that of the Pacific railroad act of 1862. The body of the act, in substance, authorized any telegraph company organized under the laws of any State in the Union to construct, maintain, and operate lines of telegraph over any portion of the public domain or along any of the military or post roads of the United States. It gave the company the right to take from the public lands stone, timber, and other materials to use in the construction and operation of its lines, and to pre-empt and use such portion of the unoccupied public lands through which its lines passed as might be necessary for stations, not to exceed forty acres for each station, provided that the stations were not within fifteen miles of each other. It gave to the United States priority in the use of the lines over all other business, reserved to the United States the right to purchase those lines, and provided for the company availing itself of any of these rights or privileges by filing its written acceptance with the Postmaster General, &c.

The leading features of this act correspond very much with many of the features contained in the Pacific railroad acts, the only difference being that the powers conferred were not so broad as those conferred by Congress upon the Pacific railroad companies, and those companies were made the agents of the Government in the exercise of the right of eminent domain. Large aids were granted to them and they were required at all times to keep their lines in order for the use of the United States.

In 1886 the Legislature of Florida passed an act incorporating the Pensacola Telegraph Company and granting them the sole and exclusive privilege of establishing a line of electric telegraph in the counties of Escambia and Santa Rosa, either from different points in said counties or connect-

ing with lines coming into said counties or either of them from any point in this (Florida) or any other State. The Western Union Telegraph Company in writing accepted the terms and conditions imposed by the act of Congress of July 24, 1886, and commenced the erection of a line of telegraph in the State of Florida and within the territory over which the State had granted the exclusive privilege to erect electric telegraphs to the Pensacola Company.

Before the Western Union Company completed its line the bill in the case determined by this Court was filed by the Pensacola Telegraph Company to enjoin the work and the use of the line on account of the alleged exclusive right of this company under its charter. On the bill in the circuit court the case was dismissed, and it came to this Court on the bill and decree.

Mr. Chief Justice Waite, in a very elaborate opinion, delivered the judgment of this Court. He said, among other things, that Congress has power to regulate commerce with foreign nations and among the several States and to establish post offices and post roads; that the Constitution of the United States and the laws made in pursuance thereof are the supreme laws of the land, and that a law of Congress made in pursuance with the provisions of the Constitution suspends or overrides all State statutes with which it is in conflict. He said that since the case of Gibbons *vs.* Ogden, in 9 Wheaton, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress; that post offices and post roads are established to facilitate the transmission of intelligence, and that both commerce and the postal service are placed within the power of Congress, because being national in their operations they should be under the protecting care of the National Government.

He said the powers thus granted were not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they kept

pace with the progress of the country and adapted themselves to new developments of time and circumstance.

After commenting further in this vein, he said that, as they were intrusted to the General Government for the good of the nation, it was not only the right but the duty of Congress to see that intercourse among the States and the transmission of intelligence were not obstructed or unnecessarily encumbered by State legislation. He shows how important it was to the people and the Government that this power should be untrammeled, and says that the Government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction; that it legislates for the whole nation and is not embarrassed by State lines; that its peculiar duty is to protect one part of the country from encroachment by another upon the national rights which belong to all.

He shows, beyond controversy, that in order that intelligence may be conveniently transmitted from place to place by the Government of the United States and its citizens that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another State from prosecuting their business within its jurisdiction if they accept the terms imposed by the National Government for this national privilege.

He shows that a State law which conflicts with this act of Congress is to that extent invalid, and that by virtue of the supremacy of the National Constitution and laws the Western Union Telegraph Company, having accepted the act of Congress in question, was authorized in that State to operate its line notwithstanding the fact that the laws of the State contained an express prohibition.

We have but to substitute for the word "telegraph" in that opinion the word "railroad" to make it cover in letter,

as it now does in spirit, this contention. If the counsel who argued the case at bar for the State was right, then the judgment of this Court in the Pensacola case is wrong. If the counsel who argued the case at bar on the part of the State of California was correct, then, if the State of Florida should feel aggrieved at this decision, all it will have to do in order to exclude the Western Union Telegraph Company, the agent of the United States in charge of the means and instrumentality by which its postal services is carried on from the jurisdiction of that State, will be to classify telegraph lines according to their length and under the disguise of an exercise of the taxing power of the State confiscate the longer lines.

To hold that the State of California may tax all of the franchises, the existence and operations, of the Central Pacific railroad and all the franchises and corporate powers held and exercised by the defendant, as well as to tax its right to exist and to operate, as a constitutional and valid exercise of the State power would be to overthrow the authority of every case cited upon the subject.

"It would," as Mr. Justice Bradley observes, "be to destroy an axiom of our constitutional jurisprudence."

The Defendant Derives Most of its Franchises from the General Government, and is, to All Intents and Purposes, a Federal Corporation.

We have in this argument treated the Central Pacific Railroad Company as a State corporation only. This is not true in point of fact; so far as it was organized under State laws it was with a capital of $8,500,000, and to build a road from Sacramento City to the eastern boundary of California, a distance of one hundred and fifteen miles. Under the operation of its California charter it could only borrow money to an amount not exceeding its capital stock, and must provide a sinking fund for the ultimate redemption of its bonds.

The State granted no power to build any road except from Sacramento to the State line. By the railroad acts of 1862 and 1864 Congress granted it the right to build a road and telegraph line from San Francisco to the eastern boundary line of the State, and thence through the Territories of the United States until it met the road and telegraph line of the Union Pacific Company, and gave to it other privileges and immunities of corporate character which have been heretofore enumerated. In the sinking-fund cases (99 U. S., 727, 728, 729) the Supreme Court of the United States, referring to the Central Pacific Railroad Company, expressly determine that these things were "additions" to the corporate power of the company, and say that "but for the *corporate powers and financial aid granted by Congress it is not probable the road would have been built.*" It was upon this grant of corporate powers, franchises, and immunities by Congress that the Court rested the authority of Congress to enact the "Thurman bill." If this Court should hold that the immunity from taxation is in any degree dependent upon the source from which the corporate powers emanated, we have in the "sinking-fund cases" the authoritative announcement of the Supreme Court of the United States that the franchise of the Central Pacific Railroad Company in part finds its source in congressional enactment, and that to the extent of the powers so conferred the franchise is a Federal franchise. This alone would render any scheme of State taxation of the franchise impracticable. How is that part of the franchise granted by the State to be segregated from that part granted by the General Government? Which part of the life of this being is at the mercy of the State? Upon which member of its body may the State tax collector execute his judgment of death? These would be pertinent questions if an attempt had been made to assess and tax *part* of the franchise of the company; but no such attempt has been made. The paltry

considerations of "mine" and "thine" have not agitated the State board of equalization, but with characteristic audacity it has seized upon the whole.

Congress has recognized the Central Pacific as a Federal corporation. Section 4 of the act of April 10, 1869 (16 U. S. at Large, p. 56) authorized the Attorney General to investigate whether or not the charter and all the franchises of the Union Pacific Railroad Company and of the Central Pacific Railroad Company had not been forfeited.

The necessities of our case fall far short of requiring us to establish the national character of the Pacific railroad companies. With that character established there could be no doubt that their franchises are exempt from State taxation, and that such is their character would seem to be no longer an open question in this Court.

In discussing this question in relation to the companies mentioned in the acts of Congress chartering the Union Pacific, and which were to build the roads connecting with the eastern end of the Union Pacific (as the Central Pacific was to build the roads connecting with the western end), the Supreme Court of the United States, in the cases of the Pacific R. R. Removal Cases (115 U. S. Rep. p. 1) say:

"Besides, the legislation of Congress in reference to all the companies so consolidated in the acts of 1862 and 1864 and subsequent acts, all of which is reviewed and commented on in the opinion of this Court in Ames *vs.* Kansas (111 U. S., 449), shows that all the said companies before the said consolidation had received large donations of land, subsidies, powers, and privileges from Congress, and had accepted and were subject to important duties to the United States Government, and were subject to a wide control of said Government, both in the construction and management of their roads and works, and one of said companies, to wit, the Union Pacific Railroad Company, was originally incorporated and organized under said acts, and was strictly a corporation of the United States, subject to the acts of Congress and having important duties to perform to the Government in the prosecution of its business. The facts that the last-

named company is one of the constituent elements of the consolidated company and that the entire system of roads now in its possession and under its charge and control constitutes one of the most comprehensive and important mediums of interstate commerce in the country, and that in all its transactions it is subject to the supervision and control of the Government of the United States are sufficient, it seems to us, to bring the Kansas cases, as well as the other cases, fairly within the principle of the case of Osborn *vs.* The Bank."

And the Court further say in the same opinion:

"The whole being, capacities, authority, and obligations of the company thus consolidated are so based upon, permeated by, and involved in the acts of Congress referred to that it is impracticable, so far as the operations and transactions of the company are concerned, to disentangle those qualities and capacities which have their source and foundations in these acts from those which are derived from State or territorial authority."

The same considerations are entirely applicable to the Central Pacific Railroad Company. In the case above referred to the point was distinctly made that defendant in error, the Kansas Company, must be regarded as having the same status as if it were still the Kansas Pacific Railroad Company, a corporation of the State of Kansas.

The Court, after remarking that this point had already received consideration, say:

"But it may be added, as bearing on this particular case, that the original Kansas company was authorized by the ninth section of the Pacific railroad act of July 1, 1862, to extend its road into the State of Missouri—that is, 'to construct a railroad and telegraph line *from* the Missouri river, at the mouth of the Kansas river, on the south side thereof (which is in the State of Missouri), so as to connect with the Pacific railroad of Missouri, *to* the aforesaid point on the one-hundredth meridian of longitude,' namely, the point

where the Union Pacific was to commence. This provision looked to the establishment of a continuous line of railroad from the Mississippi river, at St. Louis (the eastern terminus of the Pacific railroad of Missouri), to the Pacific Ocean. The power assumed by Congress in giving this authority to the Kansas company was, undoubtedly, assumed to be within the power 'to regulate commerce among the several States;' and, although by an act of the Legislature of Missouri, passed in February, 1865, the consent of that State was also given to the extension of the road into its territory and to its connection with the Missouri road, the fact remains that the company claimed and assumed to exercise its powers under the act of Congress as well as by the consent of the Legislature of Missouri."

The attempt of the State of California to levy a tax upon the existence of an agent of the National Government is a clear case of usurpation, an open defiance of the supremacy of the Federal Government as maintained in every adjudication made by the Supreme Court of the United States upon the subject.

I come now, as briefly as the limited time will permit, to present some State questions which, I think, are conclusive of this case and which certainly are conclusive of the other five cases here.

THE ASSESSMENT UPON WHICH THE ACTION IN EACH CASE IS BASED IS VOID, BECAUSE IT INCLUDED THE VALUATION OF PROPERTY OVER WHICH THE STATE BOARD HAD JURISDICTION AND WHICH THE LAW REQUIRED SHOULD BE VALUED AND ASSESSED BY LOCAL ASSESSORS.

Section 10, article 13, of the constitution of California, from which the board of equalization derives its authority, reads as follows:

SECTION 10. "All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway,

road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State board of equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

The averment of the answer in case No. 660 is as follows:

On the 18th day of August, 1883, the State board of equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section 10 of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, and rolling stock of said railroad against defendant. Said pretended assessment was not made separately upon the franchise, roadway, road-bed, rails, and rolling-stock, or any properties of said railroad, but all of said property was blended together in making said assessment, which assessment was then and there so entered upon the minutes of said board. Said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based, and no other assessment than the aforesaid was ever made of said property or any part thereof for said fiscal year. Said assessment included all property and kinds of property mentioned in section 3665 of the political code of California, as amended March 9, 1883, except depots, stations, shops, and buildings erected upon the space covered by the right of way, which last-mentioned property was assessed as provided in said section by local assessors.

The findings in No. 660 are (page 39, folio 100) that the State board of equalization, under the authority of section 10 of article XIII of the State constitution of the State of California "and in the mode and manner prescribed by sec. 3665 of the political code, made the assessment," &c.

A further finding in No. 660 (page 51, folios 138 and 139) is in the language of the averment of the answer above quoted.

The averments and findings in Nos. 661, 662, and 663 are the same.

The averment in No. 664 is the same, and the finding is the same as the findings in No. 660, with this addition, "and except steamboats."

The finding in No. 1157 (page 4, folio 51) is that the value of fences was included. This finding disposes of that case.

The section in question provides that the board must assess the franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county; that the assessment must be made to the corporation, person, or association of persons owning the same, and must be made upon the *entire railway* within the State, and must include the right of way, bridges, culverts, *wharves, and moles* upon which the track is laid, and *all steamers* which are engaged in transporting passengers, freights, and passenger and freight cars across the waters which divide the road. The depots, stations, shops, and buildings erected upon the space covered by the right of way are assessed by the assessor of the county wherein they are situated.

We have now seen that the assessment in this case did include all of the property mentioned in this section, except depots, stations, shops, and buildings erected upon the space covered by the right of way and except steamboats.

It therefore included the entire railway within the State, and it included wharves and moles upon which the track is laid. The theory of the State board of equalization seems always to have been that it had jurisdiction over all railroad property, except depots, stations, shops, and buildings erected upon the space covered by the right of way. Mr. Delmas, who had virtually been the adviser of the State board of equalization for many years, said in his argument in the Santa Clara case (118 U. S., p. 397):

"Fences built upon a line of the roadway are a part of the roadway as necessary to its protection, as much so as the railing of a bridge is a part of a bridge or the frame-work of a tunnel is part of the tunnel. Such has always been the understanding of the law in California, and the fences have always been assessed by the board of equalization.

"I have never been able to grasp the proposition that fences are no part of the railroad which they inclose. If the defendant made a conveyance of 'its railroad from San Francisco to San José' would not the fences pass by the deed? Clearly as much so as a sale of my garden would convey the fence which incloses the garden."

It is true that the steamers "Transit" and "Thoroughfare" with iron tracks laid upon their decks and used for transporting freight cars across the Bay of San Francisco from the rails on the east to the rails on the west side of that bay are part of the Central Pacific railroad. It is true that fences, if they do not belong to coterminous owners, are part of the railroad. It is also true that depots, stations, shops, and buildings erected for the railroad purposes upon the space covered by the right of way are part of the railroad. All these things would pass by grant of the railroad; but the framers of the constitution, for the purposes of taxation, separated railroad property and gave to the State board jurisdiction over the franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county, and this jurisdiction was given by enumerating the things themselves. All other property belonging to the railroad company, whether part of its railroad or not, was left within the jurisdiction of the local authorities. It was this division of railroad property and the vesting of jurisdiction in two tribunals to tax it which has made the tax so onerous. The State board of equalization, acting in conformity with the advice and belief of Mr. Delmas, included in its assessments everything except depots, stations, shops, and buildings erected upon the right of way. Local assessors assessed in their respective counties all those parts of the

railroad which were not included within the constitutional jurisdiction of the State board of equalization. In the cases argued with this, numbers 660, 661, 662, and 663, the State board includes *wharves aud moles and steamboats;* but prior to the assessment complained of in this case the supreme court of the State of California had held that the steamers "Transit" and "Thoroughfare," which were as much part of the defendant's road as its roadway or road-bed, were subject to assessment by the local assessors, and that the tax based upon such assessments was valid and compelled the company to pay it.

San Francisco *vs.* C. P. R. R. Co., 63 Cal., 467.
Santa Clara Co. *vs.* S. P. R. R. Co., 118 U. S., 413.

After this decision the State board excepted, as appears from the findings in this case, steamers, but still included the wharves and moles, which were the subjects of assessment by the local assessors under the general laws.

There is no doubt but under the decision of this Court and of the highest court of California that section 3665 is unconstitutional, and that an assessment made in accordance with its provisions must be null and void.

The board in this case, according to the findings, assessed the franchise, the roadbed, the roadway, rails, and rolling-stock. When it had assessed that property its power was exhausted, but it proceeded further and assessed the wharves and the moles, and blended their valuations with the valuations which they had fixed upon other property.

A wharf is defined by Webster to be a perpendicular bank or mound of timber or stone and earth, raised on the shore of a harbor, river, canal, or lake, or extending some distance into the water, for the convenience of lading or unlading ships or other vessels.

A mole is defined by Webster as a mound or massive work formed of large stones laid in the sea, extended in a right line or an arc of a circle before a port, which it serves

to defend from the violence of the waves, thus protecting ships in a harbor.

Now, it is true that a railroad may be and frequently in these days is laid upon a mole, or for the convenience of lading and unlading ships is laid upon a wharf. The rails, the roadbeds, and the roadway, notwithstanding the fact that they are laid upon moles or wharves, might be the subject of assessment by the State board of equalization, but these things are assessed when the assessment is made upon the roadbed, roadway, and rails.

When the State board of equalization assessed the enumerated property it had reached the end of its jurisdiction and performed all the functions which the law conferred upon it. Wharves and moles as such, though belonging to a railroad company, are subject to assessment by the local assessors alone. The State board of equalization has no more jurisdiction, because they belong to a railroad company and are used in connection with the road, than it has over the shops, depots, and steamers used as part of a road or the fences built alongside of it.

The vice of this assessment and of every one made rests upon the assumption of Mr. Delmas, followed by the State board of equalization, that because a thing would pass by grant as part of a railroad it was subject to the jurisdiction of the board. So tenacious has the board been upon that subject that, notwithstanding the decision of the supreme court of the State of California that steamers, though part and parcel of a railroad, were not the subject of assessment at their hands, notwithstanding this Court has decided that though fences may be part of a railroad, yet they are not subject to the jurisdiction of the board, the board has yielded only to the letter of these decisions and has wantonly violated their spirit and disregarded the principle upon which they are founded.

The principle of the "Thoroughfare" and "Transit" case, decided by the supreme court of California, controls here,

and would be binding upon this Court, even though this Court were of a different opinion. No such difference, however, exists. Both tribunals are in harmony, and it would seem that the case at the bar and the other cases argued with it are to end whenever the record is looked into.

To these propositions counsel for the State make but two answers. First, they say that in these cases there is a general finding that the State board assessed the franchise and roadbed, roadway, rails, and rolling stock, and that this general finding cannot be overcome by the special findings, which say that the board included in that assessment all of the property enumerated in section 3665 of the political code.

But when we turn to section 3665 of the political code, we find the language to be entirely in accord with these findings. That section declares that the board must assess the franchise, roadbed, roadway, rails, and rolling stock of all railroads operated in more than one county; that the assessment must be made to the corporation, person, or association of persons owning the same, and must be made upon the entire railway within the State, and must include the right of way, bridges, culverts, wharves and moles upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road.

As I have said, it will be seen that the assessment in accordance with this statute was made, as the findings say, upon the franchise, roadway, roadbed, rails, and rolling stock, but the State board, following the directions of this statute, included in the valuations of the franchise, roadway, roadbed, rails, and rolling stock, as directed by the statute, the value of property over which it had no jurisdiction, and which, under the constitution and laws of the State, was to be assessed and was assessed by the local assessors. This statute is clearly unconstitutional, and an assessment made in manner and form as directed by it is unconstitutional,

because it includes within the valuation of the franchise, roadway, roadbed, rails, and rolling stock the value of property which has already been assessed and valued by local officers.

But this statute was passed and these assessments were made in pursuance of the policy adopted by the State board of equalization under the advice of Mr. Delmas, that all of this kind of property may be included within the valuation of the enumerated property

The second answer which counsel for the State make to these seemingly unanswerable propositions is that it does not appear from the findings that the various companies in the five cases, other than the one now being argued ever owned a steamboat or had any.

Now, may it please the Court, if the State board of equalization valued steamboats and included their values within these assessments it was incumbent upon the State, even if the board had the jurisdiction, to show that those steamboats belong to the defendants.

If the defendants never owned a steamboat, nor a wharf, nor a mole, nor a fence so much the worse for the tax, because the very section provides that the property shall be assessed to its owner.

If the defendants in the cases had neither steamboats, wharves, moles, or fences and the assessment is so blended that they cannot be distinguished and separated from the property over which the board did have jurisdiction, then, of course, the tax falls.

Again, it appears from the findings in this case that the State board included in its assessment the right to exist and to operate; that it valued the business of the company and blended that value with the *ad valorem* values it had placed upon property. The constitution of California, the laws of California, confer no such authority upon the State Board, and for this reason alone the judgment of the court below should be affirmed.

The next and last point to which I desire to call your honor's attention is—

THE LAW OF THE STATE OF CALIFORNIA UNDER WHICH THE PROCEEDINGS IN THIS CASE WERE INSTITUTED IN THE SUPERIOR COURT AND THE LAW IN FORCE WHICH PRESCRIBES THE MODE AND MANNER OF COLLECTING TAXES ASSESSED BY THE STATE BOARD OF EQUALIZATION ARE SPECIAL AND VIOLATE THE PROVISION OF SUBDIVISIONS 3 AND 10 OF SECTION 25 OF ARTICLE 4 OF THE CONSTITUTION OF THE STATE OF CALIFORNIA.

In California there can be no suit commenced at law to recover a tax unless the suit is authorized by a lawful act of the Legislature of the State. The general laws of California provide for the assessment and collection of taxes and also regulate practice in the courts of justice of that State. The general laws for the collection of taxes in force in the State of California vary in every particular from the special law for the collection of taxes assessed by the State board of equalization. The code of civil procedure in the State of California regulates the practice in courts of justice, and in that State pleading has ever been regarded and treated as part of the practice.

The constitution of the State of California, article 4, section 25, provides—

"SEC. 25. The Legislature shall not pass local or special laws in any of the following enumerated cases—that is to say:

* * * * * * *

"3. Regulating the practice of courts of justice.

* * * * * * *

"10. For the assessment or collection of taxes."

The point here made has been determined in our favor in the superior court, and an appeal from the superior court

is now pending in the supreme court of the State of California.

I have filed with my brief in this case copies of the brief of Judge Harvey S. Brown, filed in the supreme court of California in the case there pending. That brief contains the able opinion of the learned judge of the superior court who determined the case and an exhaustive argument upon this topic, and to it I beg to refer and make it a part of this argument.

The question discussed is with you upon the record in each of the six cases now under consideration, and it is jurisdictional in its character.

In conclusion, thanking you kindly for the deep attention with which you have listened to this argument, I submit the cases for the defendants in error.

1274

Office Supreme Court U. S.
FILED
JAN 10 1888
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1887.

No. 660.

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

No. 661.

SAME

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY.

No. 662.

SAME

vs.

THE NORTHERN RAILWAY COMPANY.

No. 663.

SAME

vs.

THE CALIFORNIA PACIFIC RAILROAD COMPANY.

No. 664.

SAME

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

No. 1,157.

SAME

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR,

By GEO. A. JOHNSON,
S. SHELLABARGER,
JERE. WILSON,
Attorneys of Plaintiff.

Press of Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

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THE PEOPLE OF THE STATE OF CALIFORNIA *vs.* THE CENTRAL PACIFIC RAILROAD COMPANY.	No. 660.
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SAME *vs.* THE CENTRAL PACIFIC RAILROAD COMPANY.	No. 664.
SAME *vs.* THE CENTRAL PACIFIC RAILROAD COMPANY.	No. 1,157.

In the briefs that have been submitted, some questions have been raised for the first time in these cases.

First. The point is made that moles and wharves are included in the assessments.

1st. No such defense was set up in the answer.

Paragraph XXV complains that fences are included.

Paragraph XXV (a) that steamers are included.

Not a word anywhere in the answers about moles and wharves being included. No allegation that there *was* a mole or wharf.

No finding that there was a mole or wharf, but only a finding that it included all property and kinds of property mentioned in section 3665. This can only mean that all that the company had were included, but is not a finding that any such existed.

And upon this it is *assumed* that there were moles and wharves.

But suppose these were embraced? They were properly embraced.

1st. We assume that the State has the power to classify.

2d. If it may classify, it may make moles and wharves on which the tracks are laid a part of the road, and may provide for the assessment of these by the State Board.

3d. This is precisely what the statute has provided.

Section 3628 provides that the franchise, &c., shall be assessed by the State Board.

It further provides that all other taxable property shall be assessed by the local assessor; that this assessor must assess all the property except such as is required to be assessed by the State Board.

Section 3665 provides that the State Board shall assess the franchises, roadbed, roadway, rails, rolling-stock, *including* right of way, bridges, culverts, wharves, and moles upon which the track is laid, and all steamers which are engaged in transporting passenger and freight cars across the waters which divide the road. (Steamers will be hereinafter alluded to.)

The depots, stations, shops, and buildings erected upon

the space covered by the right of way are assessed by the assessor of the county where they are situate.

Here, then, is a clear and well-defined division of property for taxation. The moles and wharves on which the track is laid are treated as a part of the road to be assessed by the State Board.

The local assessors have no authority to assess these. No provision is made by law for the assessment of these, except by the *State Board*.

The Constitution, section 1, article XIII, provides that "all property * * * shall be taxed in proportion to its value, *to be ascertained as provided by law*."

Therefore, the Legislature had the right to provide by law a mode of ascertaining the value of this property.

Section 4 provides that all property, except the franchise, roadbed, roadway, rails, and rolling-stock shall be assessed in the county, &c., in the manner prescribed by law. And so the only question that can arise is whether wharves and moles can be considered as roadbed and roadway *independent* of any legislation, and whether the Legislature may provide that these shall be included in the railway property which the State Board is to assess.

As to these questions, we answer—

1st. The wharves and moles upon which the track is laid are just as much a part of the railway as the culverts, bridges, &c., mentioned in the same connection, on which the track is laid, and just as much so as the land on which the track is laid; and the State Board of Equalization was authorized to embrace these in the assessment without any legislation whatever, just as it could without legislation embrace the culverts and bridges.

The Central Pacific, &c., *v.* The State Board, 60 Cal., 12.

Indeed, these wharves and moles, the terminals of the railway, are the most valuable parts of this class of prop-

erty. They contribute to the value of the whole property; and by reason of the relations of these to the entire line, entering as they do into the value of the entire property; the value of these being contributed to by the other portions of the property, and *vice versa*, it is a part of the property that should be distributed along the entire line of the road, and this could not be done if assessed locally. In their nature they are part of the roadbed, roadway, &c., and without any legislative declaration would be classed as such under the constitutional provision, just as an embankment or a culvert is a part of the roadbed, and would be so classed. They are entirely different from fences *between* the roadway and coterminous lands.

2d. It is within the power of the Legislature to so declare. All parts of article XIII of the Constitution are to be construed together. Taken together, they are as follows: (*a.*) All property shall be taxed in proportion to its value, to be ascertained as provided by law.

This confers upon the Legislature the power to provide the mode of ascertaining the value.

It then provides for assessing property essentially local. It draws a line between this purely local property and that of railroad corporations that are not local, and which, reaching through counties, must be treated as a unit, and the value of this unit is to be ascertained as provided by law, and that value distributed among the various localities. This is manifestly the meaning of these constitutional provisions.

The Constitution will not be construed strictly, so as to defeat an inherent power in the State, but liberally, to accomplish the ends of government; and, therefore, since this kind of property has been separated from other property, and since its value is to be ascertained as provided by law, the Legislature could (as it did) provide that it be assessed by the State Board.

To sustain the defendant's contention that this assess-

ment is void, because moles and wharves are embraced, the defendant relies upon the case of the *City and County of San Francisco* v. *C. P. R. R. Co.* (63 *California*, 467). In that case the steamers "Thoroughfare" and "Transit" were assessed by the local assessor. The company claimed that the local assessor had no right to assess these steamers, presumably upon the ground, although it is not so stated, that these steamers formed a part of the railway, and should have been assessed by the State Board.

It appears in that case that these steamers were used in carrying freight and passengers across the Bay of San Francisco, a distance of twelve miles. Tracks were laid on the decks of these steamers. No roadway was constructed across the bay. And in dealing with this case on the facts as above stated, the Court says:

"The steamers are not the franchise. They may constitute an element to be taken into the computation of the value of the franchise. It is equally clear that they are not rails or rolling-stock. These words are to be construed according to their ordinary and popular meaning, and we do not think that it would be contended that rails or rolling-stock, in their ordinary and popular signification, include the steamers above mentioned.

"Are they then embraced within the words 'roadway or roadbed' in the ordinary or popular acceptation of such words as applied to railroads? These two words, as applied to common roads, ordinarily mean the same thing, but as applied to railroads their meaning is not the same. The roadbed referred to in section 10, in our judgment, is the bed or foundation on which the superstructure of the railroad rests. Such is the definition given by both Worcester and Webster. The roadway has a more extended signification as applied to railroads. In addition to the part denominated roadbed, the roadway includes whatever space of ground the company is allowed by law in which to construct its roadbed and lay its track."

And so it was held that these steamers were not included in the words "roadway and roadbed." In the case of the

S. F. and N. P. R. R. Co. *v.* The State Board (60 Cal. 12), the Court say:

"The roadbed is the foundation on which the superstructure of a railroad rests. The roadway is the right of way which has been held to be property liable to taxation." Citing 32 Cal. 499.

This case—63 Cal. 467—only decides that steamers used as these were used are not roadbed or roadway or rolling-stock or rails of this corporation. It does not decide that wharves and moles on which the track is laid are not roadbed or roadway, but it does decide that roadbed is the bed or foundation on which the superstructure of the railroad rests, and that roadway is the space which it is authorized to occupy for its road.

If the company has constructed a mole out into the Bay on which to place its tracks, it is roadbed and roadway. Or, if it has constructed a wharf alongside the water on which to place its tract, it is roadbed and roadway. But we here repeat that there is nothing in this record showing that there was a mole or a wharf in fact.

Another point now made for the first time in these cases is, that the law of California authorizing this suit to be brought, as it was brought, is in conflict with the Constitution of California, and therefore the suit cannot be maintained. The suit is brought under section 3670 of the Code, set forth at page 17 of the brief of the Attorney-General. The complaint was filed in accordance with the provisions of that section. The record does not disclose that any demurrer was ever filed in any of these cases at bar, nor was the sufficiency of the complaint in anyway called in question or passed upon by the Court below. That section, it will be seen, directs one suit to be brought for the entire taxes assessed by the State Board, and it prescribes the form of a complaint, and provides that that form shall be sufficient.

It is claimed now, for the first time, that that statute is in conflict with that part of section 25 of article IV of the Constitution of the State which is as follows:

"SEC. 25. The Legislature shall not pass local or special laws in any of the following-enumerated cases; that is to say: * * * Third, regulating the practice of courts of justice.

"Tenth, for the assessment or collection of taxes."

In answer to this contention, we submit—

1st. That all parts of this Constitution are to be construed together.

2d. In construing different parts of the Constitution relating to different subjects, the one part relating to one subject cannot be made to defeat another part relating to another subject.

3d. The Court will so construe the Constitution in all its parts as to carry out the manifest intent of the people of California.

Now, in making this Constitution, the people created a method of taxing such property as that involved in this case, the merits of which and the character of which have already been discussed. That method was to assess the road as a unit, to collect as a unit, and to apportion among the counties the amount so collected.

In harmony with that theory, the statute in question is enacted, to wit, if taxes are delinquent, to bring one suit for the whole, to recover judgment for the assessment as an entirety, and to distribute the money according to the respective interests of the different localities. This is a well-defined and consistent scheme for the assessment and collection of taxes. The provisions of the Constitution in relation to railroads such as the defendant is directed to a special and distinct subject-matter. The Constitution deals with it independently of, and segregates it from, the subject of taxation generally, or as applicable to all property

not thus conditioned; and, therefore, to carry out this special feature of the Constitution, the Legislature could make any appropriate provision for collecting such tax. It is within the legitimate exercise of legislative power to provide remedies, and especially it is within its power to provide methods for the collection of taxes.

In the case of the Bank of Columbia *v.* Okely (4 Wheat., 235), and also in United States *v.* U. P. R. R. Co. (98 U. S., 601), this Court held that—

"The forms of administering justice and the duties and powers of courts, as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is inalienable, so as to bind subsequent Legislatures."

This power to provide a remedy is not only inherent in the Legislature, but it is—even if there were no direct provision on the subject—impliedly granted as to this particular subject-matter by the provisions of article XIII; because when that article provides that property shall be assessed according to value, to be ascertained according to law, and then provides that railroad property shall be assessed as a unit, the power to execute that provision exists by implication just as strongly as though it had been directly expressed. But this same article XIII does contain an expression on the subject, in these words: "*The Legislature shall pass all laws necessary to carry out the provisions of this article.*" And therefore there are two provisions in this Constitution: One, that the Legislature shall provide a mode of collecting these taxes, and the other that the Legislature shall not pass any local or special law for the assessment or collection of taxes. It is apparent that the Constitution has dealt specially with this subject of the taxation of railroad property, and that the provision relied upon by the defendant has no relation to such property.

Assuming that there is a conflict between these, then

which shall stand and which shall fall? Which is to strike the other down?

But there is no conflict. The provision relied upon by the defendant is that the Legislature shall not pass a local or special law for the assessment or collection of taxes. (What the word "special" means will be hereafter considered.)

1st. It is not a local law; it applies to a general subject in a general way, and its operations are as broad as the State.

2d. It is not a special law as the word is there used. As used, it means particular, as distinguished from general; that is, a law shall not be made for one township or one county that shall not be common to all; or shall not select a particular piece of property as the subject of a special or distinct tax to which all other property of the same kind is not subjected.

See County of Tipton *v.* Locomotive Works, 103 U. S., 523, and authorities hereinafter cited.

Practically, the defendant's contention is that it was entitled to have the benefit of a multiplicity of suits against it, instead of a single suit.

What is a special law within the meaning of the constitutional provision?

Several of the States have a similar provision. The Constitution of Indiana provides (article IV, section 22):

"The General Assembly shall not pass local or special laws in any of the following-enumerated cases—that is to say: * * * Regulating the practice in courts of justice. * * *

"For the assessment and collection of taxes for State, county, township, or road purposes. * * *

"For laying out highways."

"Sec. 23. In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State."

In Hingle *v.* The State (24 Ind., 34) the Court, by Frazer, J., says:

"What is a *special* act? It is such as at common law the courts would not notice, unless it were pleaded and proved like any other fact. * * * The distinction between general and special statutes was well known to the common law, though sometimes a question of great nicety; and it is in accordance with a well-established principle to assume that the Constitution in using the terms intended them to be understood in the same sense which was at that time recognized by the Courts," &c.

See, also, Heridia *v.* Ayres, 12 Pick., 344.
Potter' Dwarris, 53.
Toledo, &c., R. R. Co. *v.* Nordyke, 27 Ind., 95.
Lomngworth *v.* Evansville, 32 Ind., 22.
McRoberts *v.* Washburne, 10 Minn., 23.
Vonphul *v.* Hammer, 29 Iowa, 222.
State *v.* Squires, 26 Iowa, 340.
Brown *v.* The State, 23 Md., 503.
State *v.* Connor, 29 Md., 516.
State *v.* Boone County, 50 Mo., 317.
People *v.* Bowen, 30 Barber, 24.
State *v.* Hitchcock, 1 Kans., 178.

The Legislature of Indiana passed a special act applying to animals killed by railroad trains. And the act being assailed as unconstitutional, the Court held in the case of Madison R. R. Co. *v.* Whitenneck (8 Ind., 219), that the act was constitutional, and said:

"*Special subjects* may require some special legislation; and when it takes place, the Court will judge whether more general legislation could reasonably be made applicable."

See, also, Henry *v.* Henry, 13 Ind., 251.

On a case arising under a statute for the opening of highways, (as to which the Constitution prohibited special legislation,) the Court said:

"The law is not special, but general. True, it relates to a particular *class of cases*, and applies to them alone; * * * but that fact does not make a *special law*."

And so here, this law, which it is now insisted is unconstitutional, because it is alleged to be special legislation, applies to a class of cases, and uniformly to all of that class, and it is therefore not special within the meaning of this constitutional provision.

Is section 3670 *unconstitutional because in conflict with that provision of the Constitution of the State that a local or special law shall not be passed "regulating the* PRACTICE *of courts of justice?"*

A conclusive answer to this is, that this act does not profess to regulate the practice locally or specially, or to regulate the practice at all.

WHAT IS PRACTICE?

In Abbott's Law Dictionary (vol. 2, p. 299) it is thus defined:

"Practice is the procedure in a court of justice through the various stages of any matter, civil or criminal, depending before it. Rules of pleading are distinguished from rules of practice in that the former tell what is the most efficient form to adopt in shaping the pleadings; the latter tell in what manner the pleadings should be brought under the notice of the Court, and what steps should be taken to obtain the benefit of them. (Hunt Eq., 6th ed., 2, 3; and see Allen *v.* Smillie, 1 Abbott's Practice, 354.)"

This statute does not attempt to deal with practice. All it does is to provide the form of complaint, and to say that form shall be sufficient. It only relates to one of the pleadings. Legislatures often declare what shall constitute *prima-facie* evidence. The provision of the Constitution here alleged to be violated obviously was meant to have the code of practice, whatever it might be, uniform throughout the State. This statute applied to every Court in the State where such a suit is brought. It applies to every case of delinquency of tax on property such as is involved here. It does not attempt in any way to control or determine the practice of the Court in the case; and therefore the conten-